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NOTE

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IIA Issues Paper Series

The main purpose of the UNCTAD Series on issues in international investment agreements – and other relevant instruments – is to address concepts and issues relevant to international investment agreements and to present them in a manner that is easily accessible to end-users. The series covers the following topics:

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Preface

The secretariat of the United Nations Conference on Trade and Development (UNCTAD) is implementing a work programme on international investment agreements. It seeks to help developing countries to participate as effectively as possible in international investment rule-making at the bilateral, regional, plurilateral and multilateral levels. The programme embraces capacity-building seminars, regional symposia, training courses, dialogues between negotiators and groups of civil society and the preparation of a Series of issues papers.

This paper is part of this Series. It is addressed to Government officials, corporate executives, representatives of non-governmental organizations, officials of international agencies and researchers. The Series seeks to provide balanced analyses of issues that may arise in discussions about international investment agreements. Each study may be read by itself, independently of the others. Since, however, the issues treated closely interact with one another, the studies pay particular attention to such interactions.

The Series is produced by a team led by Karl P. Sauvant and Pedro Roffe. The principal officer responsible for its production is Anna Joubin-Bret, who oversees the development of the papers at various stages. The members of the team include S.M. Bushehri, Patricia Mira Pontón, Aimé Murigande and Jörg Weber. The series'principal advisers are Arghyrios A. Fatouros, Sanjaya Lall, Peter Muchlinski and Patrick Robinson. The present paper is based on a manuscript prepared by Giorgio Sacerdoti with inputs from S. M. Bushehri. The final version reflects comments received from Richard Gordon, Luis F. Jimenez, Joachim Karl, Enery Quinones and A.J.W. Vanderlinde. The paper was desktop published by Teresita Sabico.

Rubens Ricupero
Secretary-General of UNCTAD

Geneva, June 2001

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UNCTAD has carried out a number of activities related to the work programme in cooperation with other intergovernmental organizations, including the Secretariat of the Andean Community, l'Agence pour la Francophonie, the Inter-Arab Investment Guarantee Corporation, the League of Arab States, the Organization of American States, la Secretaria de Integración Económica Centroamericana and the World Trade Organization. UNCTAD has also cooperated with non-governmental organizations, including the German Foundation for International Development, the Centro de Estudios Interdisciplinarios de Derecho Industrial y Económico - la Universidad de Buenos Aires, the Consumer Unity and Trust Society - India, the Economic Research Forum - Cairo, the European Roundtable of Industrialists, the Friedrich Ebert Foundation, the International Confederation of Free Trade Unions, Oxfam, SOMO - Centre for Research on Multinational Corporations, the Third World Network, la Universidad del Pacífico, the University of the West Indies, and World Wildlife Fund International.

Funds for the work programme have so far been received from Australia, Brazil, Canada, France, Japan, the Netherlands, Norway, Sweden, Switzerland, the United Kingdom and the European Commission. China, Egypt, Guatemala, India, Jamaica, Malaysia, Morocco, Peru, Sri Lanka and Venezuela have also contributed to the work programme by hosting regional symposia. All of these contributions are gratefully acknowledged.

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Executive summary

The bribery of foreign public officials in the course of cross-border investment and international business transactions, i.e. transnational bribery, raises significant foreign direct investment (FDI)-related issues for host countries, transnational corporations (TNCs) and their home countries. This paper examines the topic of transnational bribery in the context of international investment agreements (IIAs), as well as other international instruments that address issues related to the making of such illicit payments ("IIA related instruments"). The paper focuses on how IIAs and IIA-related instruments have addressed the issue of combating transnational bribery through international obligations by States to criminalize such transactions within their national jurisdictions.

The paper follows the development of efforts by Governments to combat corruption at the international level, while, at the same time, recognizing that these efforts would have to be undertaken at all levels and by all actors concerned with the problem, including TNCs and non-governmental organizations (NGOs). The paper begins with the identification of the principal issues that arise in connection with establishing obligations to criminalize transnational bribery. Then it takes stock of how IIAs and IIA-related instruments have dealt with those issues, analysing how relevant provisions address illicit payments. The paper continues by noting the interactions that arise between the present topic and those considered in other papers in the Series. The analysis then addresses the development and policy implications of illicit payments, and concludes with a discussion of some options that could be considered should parties choose to address this issue in IIAs.

The criminalization of the bribery of foreign officials entails the establishment of an offence that includes a legal definition that refers to a form of prohibited conduct, which is sanctioned in national penal codes. The issues that arise with respect to the legal definition are:

- What is the offence of bribery and its scope?
- Who is a "public official"?
- What is transnational bribery?

The definition of the offence of transnational bribery is developed in such a way as to avoid circumvention by including not only direct transactions between the principals concerned, but also indirect transactions through whatever intermediaries and means. In addition, issues arise as to how to overcome inconsistencies presented by the diversity of national legislation in this area and the lack of efficient international mechanisms for investigation, prosecution and enforcement of applicable sanctions against those involved in transnational bribery. In this respect, there are concerns that international rules should not create a competitive disadvantage for enterprises from one country *vis-à-vis* those of other countries not involved in anti-bribery initiatives. At the same time, other concerns exist with respect to ensuring that the different national legal systems function towards a common end, which is difficult, especially in view of issues relating to extraterritoriality. In this connection, the paper discusses issues related to jurisdiction, international cooperation, enforcement and sanctions, as well as those dealing with the responsibility of TNCs.

Most IIAs or IIA-related instruments that deal with transnational bribery – and these are few – provide for a definition of the offence, either by giving a distinct definition or by establishing the scope of the offence of bribery in such a way as to include (or limit it to) its transnational dimension. In order to avoid circumvention, the offences target not only the principals in corrupt transactions, but also all those that are involved in its realization. This includes intermediaries, wherever they might be located, as well as those that are the actual recipients of the undue advantages, so long as such advantages are the *quid pro quo* for the improper act of a public official.

International anti-bribery agreements seek to obtain the maximum possible latitude for each State party to be able to exercise jurisdiction in the investigation and prosecution of instances

of transnational corruption. Thus, they require countries to establish their jurisdiction to prosecute such transactions on the basis of the concepts of territoriality (including the "effects doctrine") and nationality, as well as any other basis that is available under their national legal systems. At the same time, IIAs or related instruments include provisions with respect to international cooperation to minimize conflicts of jurisdiction, in terms of both the simultaneous exercise of jurisdiction by two or more States and extra-territorial application of the laws of one State. Indeed, a particular feature of transnational bribery is that, in a given case, elements of a transaction take place in at least two, but quite possibly three or more countries. Thus, agreements in this area provide for international cooperation not only as regards conflicts of jurisdiction, but also with respect to the investigation and prosecution of alleged offences, extradition of the suspected perpetrators, gathering of evidence, and seizure and confiscation of the proceeds of a transaction. The touchstone of efforts to combat transnational bribery is in the enforcement and sanctions that are provided in related international instruments. In this respect, States that are party to such agreements are required to take all necessary measures to enforce their laws against corruption. At the same time, provisions are included to ensure that differing substantive or procedural standards between the various national legal systems are not applied in such a way as to result in the competitive disadvantage of their companies. Moreover, in order to increase the effectiveness of international anti-bribery agreements, criminal sanctions are typically complemented by non-penal measures that are addressed to TNCs. These include obligations on the part of TNCs concerning reporting of relevant information to shareholders, as well as reporting requirements concerning corporate accounts, bookkeeping and financial statements. Such rules are intended to make concealing illicit transaction more cumbersome and financial irregularities more easily detectable by auditors.

The topic of transnational bribery interacts with a number of other topics and issues that arise in discussions that relate to FDI and IIAs. Perhaps the most important interaction is with transparency, which is an important element in the efforts to prevent corruption. Governments' efforts to increase the transparency

of their activities include the areas of procurement, regulatory procedures and decision-making processes, and fiscal, monetary and financial policies and practices. Adequate accounting standards, both public and private, in home and host countries, coupled with appropriate reporting and disclosure requirements, could increase the chances of uncovering illegal payments. Another interaction is with the standards of treatment in IIAs, as the failure of a Government to act against bribery could result in claims of its breach of such standards. Other interactions include taking of property, dispute settlement and social responsibility.

The lack of checks and balances on the power of officials, the high degree of discretion that public officials are permitted to exercise, and the lack of transparency, monitoring and accountability in administrative processes could contribute to an environment that is conducive to transnational corruption. It is generally considered that the higher the level of corruption, the lower the degree of legal security and predictability that investors feel in their dealings with Governments. In other words, the lack of confidence necessary to investment would hamper economic initiative. At the same time, corruption may reduce or even cancel the benefits expected from FDI for a host country, as it can distort the objective use of governmental powers in assessing investments from abroad for the public good in favour of private gains.

Thus, on the one hand, Governments seek to ensure that TNCs do not benefit from the protection afforded to them in IIAs while resorting to the making of illicit payments that could reduce the expected benefits from their investment to a host State. On the other hand, TNCs would need to be safeguarded from arbitrary, discriminatory or anti-competitive action that either results from bribery or may be directed towards them under an illegitimate funding that implicates them in a corrupt transaction. The policy options that present themselves for inclusion in IIAs would therefore need to be considered in view of these factors. The range of available options are from making no references to illicit payments in IIAs, on the one hand, to the inclusion of substantive provisions that address transnational bribery issues, on the other.

INTRODUCTION

Corruption in public service or private transactions is not a new phenomenon. It has many facets, one of which is illicit payments, or bribery, as it is more commonly called. Bribery is disapproved of on both normative and economic grounds. It raises political and larger systemic questions with respect to its effect on governance and the role of government in its cause and treatment.[1] Bribery connected to public office is an important element of these larger questions. The normative issues encompassed in political, sociological and moral concerns with respect to corruption are, however, beyond the scope of this paper. Rather, it focuses on the issue of illicit payments – in particular its transnational dimension – and the way it is addressed in IIAs and related instruments. It needs to be noted at the outset, however, that bribery is not a core element of IIAs and investment protection. Indeed, the issue is typically not addressed in such agreements.

Still, efforts to combat corruption are increasingly being pursued by Governments, TNCs and NGOs. More specifically, this paper examines issues related to illicit payments that are relevant to IIAs. It first identifies the principal issues that arise. Then it takes stock of how IIAs and IIA related instruments have dealt with those issues, analysing how relevant provisions address illicit payments. Third, the paper notes the interactions that arise between the present issue and those considered in other papers in the Series. Finally, the paper examines the development and policy implications of illicit payments, and concludes with a discussion of some options that could be considered should parties choose to address this issue in IIAs.

Note

1 A large literature exists on the general question of bribery. See, for example, Alesina and Rodrik, 1994; Andvig, 1991; Bardhan, 1997, Bernasconi, 2000; Eigen, 1996; Gould and Amaro-Reyes, 1983; Heidenheimer, 1970; Huntington, 1968; Johnston, 1998; Mauro, 1995 and 1997; OECD, 2000b; Rose-Ackerman, 1998; Sacerdoti, 1999; Tanzi, 1994 and 1998; Theobald, 1990; Kpundeh and Hors, 1998; Vincke, Heimann and Katz, 1999; and World Bank, 1997.

Section I

EXPLANATION OF THE ISSUE

The globalization of the world economy increases the risk of transnational corruption and facilitates transnational bribery for a variety of reasons. First, the number and magnitude of, as well as the competition for, cross-border business transactions have risen, thus increasing the motive to engage in illicit payments. Secondly, Governments and, hence, public officials, often interact with foreign investors in large transactions either directly or by means of authorisations and incentives, which creates the opportunity for bribes. Some areas of public sector activities that could be particularly susceptible to transnational corruption, including the making of illicit payments, comprise for example; export/import controls, health safety controls, dispute settlement and legislative action relevant for FDI. A typology of Public Sector Corrupt Practices that seem to be particularly relevant in this framework is set out in table 1 below. Thirdly, the liberalization of financial operations renders international controls more difficult, especially in the light of the wide availability of offshore tax and banking havens, which creates the means to hide or launder the proceeds of such illicit transactions.

Bribery can have important consequences for FDI, from the perspective of both Governments and TNCs. Corruption can distort FDI flows from areas identified by Governments as having development priority to those areas that would instead maximize only, or primarily, private gain. Additionally, bribery can create general allocation distortions, and the payment of bribes could ultimately increase the costs to host economies themselves in the form of inflated and excessive payments, either by the Government or consumers, for the purchase of goods, services or technology provided by foreign investors, thereby having negative effects for the society at large. In sum, there is ample reason for

Table 1. Typology of public sector corrupt practices

Primary area of public sector activity	Elements of activity open to corrupt practices
Public expenditure programmes.	The allocation of real, financial and administrative resources for public programmes, including the earmarking of resources across sectors and regions. Also includes the prioritization of expenditures and programme scheduling, determination of expenditure quality, and the distribution of goods utilised in the course of the programmes.
Public procurement.	Negotiation with domestic and transnational operators for the purchase of assets or services. Also includes the selection of suppliers, contractors and operators, as well as the pricing of procurement.
Government licensing.	The selection of entities (especially if licenses are rationed), determination of supply levels, and the pricing of licenses for entities to undertake specific economic activities. This includes the import and export of particular products,production of specified goods or services, or exploitation of particular natural resources. Also includes licenses authorising trade in certain products or in certain regions of the country.
Centralized control of fiscal and financial policy measures.	The selection of recipients, determination of values of allocation, pricing of allocation and management of default situations, through centralised agencies such as central banks, for activities related to international finance ranging from the allocation of foreign exchange to financial credit under systems of non-market administered control.
The sale of public assets to private sector interests under programmes of privatisation.	Determination of asset valuation. Determination of terms and conditions of sale. Selection criteria of buyer.
The management of private activities.	Determination of pricing. Controls on scale and location of operation. Environmental controls.
The administration of the tax revenue system (for both internal and international transactions).	Determination of liabilities and their collection.
The operations of the public enterprise sector, including the purchase and sale of goods and services.	Pricing and invoicing of imports and exports.

Source: OECD, 1997a, p. 52.

Governments to recognise that bribery could reduce the potential that FDI has to contribute to national development objectives. At the same time, such illicit transactions can reduce commercial predictability and create an uneven playing field for private enterprise. Since predictability and non-discriminatory standards of treatment are important components for international business with respect to FDI, especially where the latter involves substantial amounts in long-term projects, FDI is likely to be adversely effected.

Transnational corruption, including the bribery of foreign public officials, is an important subset of the larger issue of corruption, given that the substantial sums that are often involved in FDI increase the prospects for significant private gain. Yet, national efforts to combat corruption have typically not included the relationship between local enterprises and foreign public officials.[1] Thus, a double standard can be created where the bribery of a local official is outlawed, but illicit payments to a foreign public official are condoned. Additionally, the investigation of local corruption might require appropriate international mechanisms for mutual police and judicial assistance and cooperation. Such assistance and cooperation would need to take place between countries in which an enterprise offering a bribe, the financial intermediaries who may facilitate such an illicit transaction, and a public official who receives a bribe are located. Thus, the effective control of corruption requires addressing transnational bribery in a context that would provide national governments with appropriate tools to investigate and prosecute all parties involved in such transactions (Vogl, 1998). The argument about a double standard has been addressed by the actions of the countries of the Organisation for Economic Co-operation and Development (OECD) under their 1997 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997 OECD Convention).

Efforts to counter the bribery of foreign officials have increasingly involved action at both the national and international levels, by Governments, international business

and civil society, including NGOs. Such efforts at the level of Governments can be classified into initiatives intended to *prevent* corruption and, more commonly, those designed to define and *criminalize* specific behaviour deemed to constitute corrupt practices. With respect to the prevention of corruption, the main issue involves the reduction of the opportunity for, and the means of, bribery through commitments with respect to transparency, disclosure and accounting, and the reduction of the discretion of public officials in relation to transactions involving a Government.

Given that transparency is an important element in the efforts to prevent corruption, and yet it also involves other issues that go beyond corruption, the topic is covered separately in another paper in this Series (UNCTAD, forthcoming b). Hence, transparency will not be discussed in this paper in detail. It should be noted, however, that governmental efforts to increase the transparency of their activities generally encompass the areas of procurement, regulatory procedures and decision-making processes, and fiscal, monetary and financial policies and practices.[2]

Some efforts to prevent transnational bribery have also been made by a number of TNCs, mainly through internal processes and procedures that affect conduct of their employees and representatives, but also through the promotion of best practices in relevant industry groupings. NGOs have contributed to this effort by taking on the role of both pressure groups and watchdogs *vis-à-vis* Governments and international business. In this connection, NGO activities include promoting awareness of the problem of transnational bribery, publicizing its incidences and responses thereto, and advocating coordinated action to combat the phenomenon.

Traditionally, however, international efforts concerning transnational bribery have centred on its criminalization. This implies that the main actors in this area are Governments. The role of TNCs and NGOs would therefore be complementary to official efforts to investigate, prosecute and enforce criminal

sanctions in cases in which transnational bribery is at issue. As indicated earlier, in many countries, including some developed countries, paying a bribe to a foreign public official is not a criminal offence. On the contrary, such a payment could even be considered as a legitimate deductible expense for the company disbursing it, thus reducing the cost of the payment from a business point of view.[3] In countries in which anti-bribery laws have been enacted, vast differences exist in their application, sanctions and enforcement, usually due to differences in criminal legal systems.

Thus, international rule-making and cooperation have become necessary to overcome inconsistencies presented by the diversity of national legislation in this area, and the lack of efficient international mechanisms for investigation, prosecution and enforcement of applicable sanctions against those involved in transnational bribery. In this connection, two significant hurdles need to be overcome. First, countries might be concerned that international rules do create a competitive disadvantage for their respective enterprises *vis-à-vis* those of other countries not involved in anti-bribery initiatives; this means that major exporters and importers of international investment would need to be somehow linked to such initiatives. Second, effective international anti-bribery commitments would entail that the different national legal systems function towards a common end, which is difficult, especially in view of issues relating to extraterritoriality.

Against this background, a number of issues related to the bribery of foreign officials can arise in the context of IIAs and related instruments. These include:

- **Definitions.** The criminalization of the bribery of foreign officials implies that a certain offence is established, which becomes the subject matter of legal definitions and refers to a form of conduct prescribed by international agreements or domestic law. The problem exists that legal definitions are by no means identical if one looks at the relevant laws of various countries, although a common core can be identified on a comparative basis.

1. **What is the offence of bribery and its scope?** Bribery connotes a transaction that provides the parties involved with undue payment (interpreted widely to include any property having financial and non-financial value) or other benefit or advantage. This includes a payment or advantage that is in consideration of (non) performance of that which is already due by virtue of the recipient's terms of service, or other commitments and obligations. It also includes payments in consideration for the receipt of information, services or other advantages that the payer would not otherwise be entitled to receive. In this connection, issues arise as to how to distinguish between legitimate, negligible or otherwise benign gifts that are customary in some cultures and those that would constitute a bribe.

   The effectiveness of an anti-bribery law in part depends upon its scope. This is especially the case given that there is no direct victim and, therefore, there may be difficulties in detecting and investigating such offences. Thus, the issue arises as to how best to address this matter and impose penalties on all potential parties to a bribe, including third party intermediaries, regardless of whether a given party is soliciting, offering, facilitating or complying with a demand for a bribe. In this connection, the issue of circumvention arises. In order to avoid circumvention, not only direct, but also indirect payments would need to be considered in the definition of the offence of bribery, including advantages in kind and payments to third parties where a principal actor in the transaction is an indirect beneficiary. Such payments could also encompass contributions to political parties, elections and campaigns.

2. **Who is a "public official"?** Generally speaking, illicit payments involve at least two individuals. In the general case of the bribery of a public official,

it follows that one of them is a person entrusted with a public office or function. Issues arise within each legal system as to what is meant by "public function". Typically, this would include a person acting in a public capacity on behalf and in the interest of a State entity or other public body, or performing what is defined as a public task or function in the country within whose system he or she operates. For example, persons holding legislative, administrative or judicial offices, as well as employees of State enterprises and international organizations, would typically be considered as public officials.

3. **What is transnational bribery?** From the previous discussion, it follows that the bribery of a foreign official may simply be defined as bribery directed from businesspeople and companies of one country to public officials of another country. This would typically occur where the parties are seeking improperly to obtain an advantage in the conduct of international business, as in relation to an investment or a procurement or trade transaction.

- **Jurisdiction.** The uniformity and effectiveness of international action against transnational bribery also depends on the jurisdictional basis according to which signatories proceed to the application and enforcement of their respective obligations to prosecute the offence. Territorial jurisdiction is found in all legal systems and thus could be asserted with respect to local bribery issues. However, territorial jurisdiction can easily be avoided when transnational bribery is at issue by carrying out the transaction in a third country. In addition to territorial jurisdiction, countries can therefore also regulate the conduct of their nationals at home and abroad under the concept of jurisdiction based on nationality. In order to reach effectiveness in international instruments that address transnational bribery, the issue arises as to how to extend – to the maximum extent possible in accordance

with the constitutional system of each party – the jurisdiction of each country to investigate, prosecute and sanction those who contravene anti-bribery laws and conventions. In this connection, the issue arises as to how to address situations in which more than one party has exercised (or wishes to exercise) jurisdiction with respect to the same act of bribery.

- **International cooperation.** As indicated earlier, effective co-operation between countries with respect to the investigation and prosecution of transnational bribery is one of the central aims of international action in this area. In the absence of international agreements, the exchange of information, taking of evidence and supply of documents may be impossible. Even where conventions exist, co-operation may be cumbersome, and persons affected may legally obstruct compliance by the authorities of the requested country by having recourse to available judicial remedies. Moreover, evidence of transnational bribery – especially that contained in corporate and bank records – may not be kept either in the country of the public official, or in the country where the TNC involved has its head office. Rather, such evidence might be located in offshore countries. This makes effective treaty provisions in this respect essential, especially in terms of mutual legal assistance and extradition.

  A connected issue is that of monitoring effective application of a given international instrument by its contracting parties. This is especially important when the regulation of the economy is at stake, because different levels of compliance result in different standards applied to companies of different national origins, to the detriment of their competitors and of host governments.

- **Enforcement and sanctions.** A number of issues arise with respect to the enforcement and sanctions associated with the offence of transnational bribery. While, as a general proposition, it might be acceptable to subject

TNCs to anti-bribery laws in their international business dealings, lax implementation of international commitments might result in the risk that, while companies are prosecuted by their national authorities, host governments would condone the action of the public officials involved. A second concern, as indicated previously, is the resulting competitive disadvantage of companies whose home countries are parties to anti-bribery conventions *vis-à-vis* their competitors whose home countries have not become parties to such conventions, or where different substantive or procedural standards might exist in different countries with respect to the same offence. This would include, for example, circumstances in which countries have different timeframes within which they could legally prosecute violations of laws on transnational bribery.

A related question arises when bribery takes place by or in the interest of corporations. To maximize the deterrent effects of anti-bribery laws, an issue is to what extent a corporation itself (and not just the managers or intermediaries responsible) could be subject to sanctions. This is problematic in many legal systems in which criminal liability concerns only individuals as opposed to legal persons. Even in such instances, however, non-criminal pecuniary sanctions are usually available, and may be imposed on corporations, in addition to any individual involved, or even if the individual responsible cannot be prosecuted or punished because of some factual obstacle or lack of jurisdiction.

With respect to sanctions, a further concern is the possible effects that penalties provided for in anti-bribery conventions would have on the rights and obligations of States as regards the treatment and protection of foreign investment in IIAs. For example, where sanctions mandated in conventions that prohibit transnational bribery include an administrative decision to annul any licenses that have been issued as a result of an illicit payment, such action might be challenged under a general expropriation

clause in an IIA. This could subject the same offence to adjudication under a multiplicity of fora and, potentially, in accordance with differing legal standards. Indeed, should an IIA also include investor-State dispute resolution provisions, such a mechanism would in effect internationalize criminal proceedings that are typically, even under instruments that address transnational bribery, a matter left for national authorities.

- **The responsibility of TNCs.** As indicated previously, TNCs play a crucial complementary role with respect to efforts to prevent and counter transnational bribery. In this respect, they could contribute to the control of transnational bribery by providing information and complying not only with anti-bribery laws, but also with requirements concerning financial reporting standards. Issues arise on how to prevent transnational corruption by dissuading TNCs and their managers from using bribery as a means of doing business. Typically, preventive rules that pertain to bookkeeping, accounting and disclosure standards could make deviations more cumbersome and easily detectable by auditors.

The issues identified in this section are not meant to be exhaustive. From a legal perspective, many other (sub)issues require consideration in the context ofinternational negotiations. Differences in approach and formulations to the problematic of criminalization of transnational bribery in IIAs and related instruments depend, to a large degree, on the purposes and objectives of the parties involved, as well as their political, legal and administrative cultures. In the next section, stock will be taken as to how the main issues identified here have been addressed in IIAs and related instruments; to the extent possible, variations in approach and formulation will be highlighted and discussed.

Notes

1 A notable exception are the efforts of the United States, which has addressed the specific issue of the bribery of foreign officials in its national law. Indeed, an increasing number of other countries have also, under the auspices of the OECD, undertaken to address this issue and have adopted changes in their respective laws.

2 These efforts have been made mostly in regional or multilateral international fora, and under the auspices of international organizations. Examples include the 1999 Asia Pacific Economic Cooperation (APEC) Non-Binding Principles on Government Procurement (APEC, 2000) ; the 1998 International Monetary fund (IMF) Code of Good Practices on Fiscal Transparency (IMF, 1998) and the 1999 Code of Good Practices on Transparency in Monetary and Financial Policies (IMF,1999); the 1992 World Bank Guidelines on the Treatment of FDI and 1995 Guidelines for Procurement under IBRD Loans and IDA Credits (World Bank, 2001); the 1995 WTO Agreement on Government Procurement (WTO, 2001), and the 2000 OECD Guidelines for Multinational Enterprises (OECD, 2000a).

3 It should be noted however that, since the adoption of the 1996 OECD Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials (OECD,1996), most member countries have changed their legislation in line with the Recommendation.

Section II

Stocktaking and analysis

The idea that it is improper to offer inducements to influence public officials – and consequently to receive them – has longstanding roots. However, the translation of this idea into law has been inconsistent over time. In Europe, for example, criminal sanctions to punish illicit payments to public officials can be found only from the last century onward, beginning with the French Code of 1810. Moreover, the extent to which such laws are enforced and bribery prosecuted varies greatly.

Transnational bribery can also be traced long before the current era of globalization, although now the motives, opportunities and means have increased significantly. Today, many governments are undertaking autonomous reviews of their legislation concerning transnational bribery (UNGA, 2000). One of the first and most comprehensive national efforts to combat transnational bribery is the United States "Foreign Corrupt Practices Act of 1977". The Act has made it illegal for United States companies, under criminal sanctions, to bribe foreign public officials (box 1). Similar efforts have been undertaken by countries that have enacted laws giving effect to international conventions, such as the 1996 Organization of American States Inter- American Convention against Corruption (Inter-American Convention).

Box 1. Summary of the United States Foreign Corrupt Practices Act of 1977

The Foreign Corrupt Practices Act (United States Code, 1977) makes it unlawful to bribe foreign officials to obtain or retain business. The anti-bribery provisions apply first to "domestic concerns", defined as any individual who is a citizen, national or resident of the United States or any corporation, partnership or other organisation with its principal place of business therein. A similar prohibition applies

/...

Box 1 (continued)

with respect to payments to a foreign political party or a candidate for foreign political office.

The Act also prohibits bribes paid by a domestic concern and its officials through intermediaries while knowing that all or a portion of the payment will be offered or given directly or indirectly to a foreign public official. The anti-bribery provisions apply also to certain issuers of securities, irrespective of whether they are United States or foreign companies, by requiring filing of periodic reports to the Securities and Exchange Commission.

The Act requires also that these corporations meet certain accounting standards, that is to maintain books and records that accurately and fairly reflect the transactions of the corporation and to design an adequate system of internal accounting controls. As amended in 1988 (ibid., 1988) the Act provides an explicit exception to the bribery prohibition for "facilitating payments" for "routine governmental action", that is for minor payments meant to facilitate the provision of permits, licences, visas, phone service, etc.

The United States Department of Justice is responsible for the criminal enforcement of the Act. Firms are subject to a fine up to $2 million; officers, directors and stockholders acting on behalf of a company are subject to a fine up to $100,000 and imprisonment up to five years. While only a few criminal proceedings have been brought under the Act, and no offender has ever served jail terms, its preventive effect on corporate conduct by United States companies is generally considered as having been substantial. In particular, United States TNCs have introduced and enforced programmes of monitoring and compliance by their personnel in order to avoid violating the statute.

United States business also encouraged its Government to act in order that other countries, especially those in which their major competitors on the international market are located, introduce similar standards of behaviour in order not to be put at a competitive disadvantage. The efforts of the Government in this direction

/...

Box 1 (concluded)

ultimately helped to produce the 1997 Convention on Combating Bribery of Officials in International Business Transactions, negotiated within the OECD. In order to enforce the OECD Convention of 1997, the Act was amended in 1998 (ibid., 1998). Its jurisdictional provisions, both territorial and personal, have notably been expanded. They also now cover foreign persons and firms who commit a corrupt act in the United States, as well as United States persons and businesses, even if no territorial link exists with the United States.

Source: UNCTAD.

Efforts to combat transnational bribery at the national level have also been undertaken by TNCs, as well as NGOs. Some businesses have developed "codes of conduct" with respect to bribery. (The topic of corporate codes of conduct is more specifically discussed in another paper in this Series entitled *Social Responsibility,* UNCTAD, forthcoming a). Such anti-bribery commitments have encompassed a broad range of approaches, from general statements prohibiting bribery to relatively detailed primers that address employee conduct with respect to payments to public officials (Gordon and Miyake, 2000). The civil society's involvement in dealing with transnational bribery is illustrated by the activities of Transparency International in a number of countries (box 2).

While international efforts to address transnational bribery can be traced back to the 1970s, developments at the international level gained momentum in the 1990s, when it was realized that individual national efforts alone may not be sufficient in this area. As early as 1976, an *ad hoc* Intergovernmental Working Group and a Committee on an International Agreement on illicit payments was established under the auspices of the United Nations Economic and Social Council (ECOSOC) to address the issue of corrupt practices (ECOSOC, 1979).[1] NGOs also addressed bribery in business transactions at the international level, for example in 1976, with the establishment of an *ad hoc* Commission

Box 2. Transparency International[a]

Transparency International (TI) is a non-governmental organization dedicated to increasing governmental accountability and curbing international and national corruption. It is the only global non-profit and politically non-partisan organisation with an exclusive focus on corruption.

Founded in 1993, TI is active in more than 70 countries and in the international arena, with a small secretariat in Berlin. National chapters form its core. Among other things, they monitor national developments. National chapters are financially and institutionally independent and are called upon to observe the TI guiding principles of non-investigative work and independence from government, commercial and partisan political interests.

TI defines corruption as the abuse of public office for private gain. This effectively means the taking of decisions to serve private interests, rather than the public good. TI believes that combating corruption is only possible by involving all stakeholders in a society: the State, civil society and the private sector.

At the national level, TI promotes, through its national chapters, the concept of "integrity pacts" in order to curb corruption in the area of public procurement. Yet, corruption often transcends the national level and is beyond the reach of national governments alone. Therefore, TI works to ensure that the agendas of international organizations – both governmental and non-governmental – give high priority in their programmes to curbing corruption. TI also seeks to shape public policy discussions in various fora – such as the Council of Europe, the European Union and the Organization of American States – to criminalize transnational corruption in an internationally coordinated manner. It also strives to develop coherent international norms to fight and prevent corruption, e.g. in the fields of auditing or international finance.

Other initiatives undertaken by TI to tackle the problem of international corruption include the publication of "best practices" in the area of building and maintaining a country's national integrity system in its TI Source Book and annual surveys of key themes in corruption and the fight against corruption in a report entitled the Global Corruption Report. The Report includes evidence of corruption, both by payers of bribes (Bribe Payers Index) and bribe recipients (Corruption Perceptions Index).

Source: UNCTAD, 1999a, p.142, based on information provided by Transparency International.

[a] For more information, see Transparency International, 2001.

of the International Chamber of Commerce (ICC) to investigate the extent to which countries have effective legislation to prohibit extortion and bribery (ICC, 1977).[2]

Against this background – and prior to taking stock of how the issues identified in section I of this paper have been dealt with in IIAs and other relevant international agreements – one point needs to be clarified. It is recognized that not many international agreements on the promotion and protection of investment specifically address transnational bribery and corruption, especially with respect to the criminalization of acts that would constitute such practices. Indeed, for example, bilateral investment treaties (BITs) do not directly address the issue. Therefore, in the remainder of this section, the analysis focuses on a discussion of the treatment of the issues related to transnational bribery in international instruments that are related to the operation of TNCs i.e. those that address bribery in international business transactions, the obligations of TNCs in this regard, or related topics.

A. Definitions

The prohibition of certain conduct under the threat of criminal sanctions requires a clear description as to what acts would be punishable under the relevant laws. With respect to transnational bribery, some elements are typically included in international agreements to render a precise legal description for the act of bribery. They are:

(1) an offer or demand (the following terms are typically used: the offering, promising, giving, soliciting, demanding, accepting or receiving);[3]
(2) to or by a foreign public official;
(3) of any payment (usually terms such as gift or advantage are included);
(4) by a person or corporation (which are also referred to as natural and juridical persons); and
(5) for undue consideration of (non)performance of duties.

1. The offence of bribery

The 1979 United Nations ECOSOC draft International Agreement on Illicit Payments (United Nations draft International Agreement on Illicit Payments) requires, in its article 1(1), each contracting party "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 connection 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 connection with an international commercial transaction."[4]

Article 1(2) of the draft Agreement provides that the same acts should be made punishable when committed by a juridical person, i.e. a corporation. In the case of a State that does not recognize criminal responsibility of corporations, the same article requires a contracting party to "take appropriate measures, according to its national law, with the objective of comparable deterrent effects". In order to avoid circumvention, the scope of article 1 is wide. The offence covers direct or indirect payments (and demands therefor by public officials) made by or on behalf of individuals or corporations. However, a question arises as to whether or not the offence is limited to instances where the payment is to or for the benefit of a public official, which, for example, could be at issue in the case of contributions to a political

party. Furthermore, by limiting the scope of the offence to circumstances involving the performance of the duties of a public official that are in connection with *an international commercial transaction*, the draft Agreement essentially identifies the offence as transnational bribery. However, this does not imply that the scope is limited only to transactions that include TNCs on the one side and foreign public officials, on the other side. The scope would also cover instances where a domestic firm bribes a domestic public official for, say, the undue issuance of a permit to export a product whose export is otherwise restricted.

Article VI of the 1996 Inter-American Convention in its paragraphs 1(a) and (b) defines bribery, as a subset of corruption:[5]

> " The solicitation or acceptance, directly or indirectly, by a government official or a person who performs public functions, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage for himself or for another person or entity, in exchange for any act or omission in the performance of his public functions;
>
> "The offering or granting, directly or indirectly, to a government official or a person who performs public functions, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage for himself or for another person or entity, in exchange for any act or omission in the performance of his public functions; ..."

Under the Convention, therefore, the (1) solicitation or acceptance and/or offering or granting (2) by or to a government official or person who performs public functions (3) of any article of monetary value, or other benefit i.e. (examples of which include a gift, favour, promise or advantage) (4) in exchange for any act of omission in the performance of his public functions, constitutes the offence of bribery.

It is interesting to note, from a drafting perspective, that the provider of a bribe is not specifically included as an element of the definition of the act of bribery. However, the Convention does provide, in its article V, that each "State Party may adopt such measures as may be necessary" to prosecute its nationals for committing the offence, which would presumably include its own public officials and TNCs. With respect to the "article of value or other benefit" referred to in paragraphs (a) and (b), it is not specifically required that such consideration be related to *undue* performance of duties. Thus, a question might arise, for example, as to whether or not a payment made to *expedite* the performance of official functions would constitute bribery.

In general, the scope of the offence under the Convention is broad, as it covers direct or indirect demands for bribes by public officials and payments therefor that are made by or on behalf of individuals or corporations. The offence covers payments to a public official, either for her own benefit, or that of another. Finally, it is not limited to cover only the international dimension of bribery; transactions that are completely domestic are also included.

The 1996 United Nations General Assembly (UNGA) Resolution 51/191: "United Nations Declaration against Corruption and Bribery in International Commercial Transactions" includes two provisions, which together define the act of bribery. As provided in its articles 3(a) and (b), these are:

> "The offer, promise or giving of any payment, gift or other advantage, directly or indirectly, by any private or public corporation, including a transnational corporation, or individual from a State to any public official or elected representative of another country as undue consideration for performing or refraining from the performance of that official's or representative's duties in connection with an international commercial transaction;

> The soliciting, demanding, accepting or receiving, directly or indirectly, by any public official or elected representative of a State from any private or public corporation, including a transnational corporation, or individual from another country of any payment, gift or other advantage, as undue consideration for performing or refraining from the performance of that official's or representative's duties in connection with an international commercial transaction; …"

The Resolution's definition of bribery follows closely the definition of the United Nations draft International Agreement on Illicit Payments, and contains the five typical elements. The scope of the definition is wide, as it includes direct and indirect solicitation and payment of bribes. The offence deals essentially with the classical instance of transnational bribery within the context of an international commercial transaction.

The 1997 OECD Convention provides for a definition in its article 1(1):

> "Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business."

Its article 2 requires that the contracting States "take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official". The scope of the offence is limited only to instances of active bribery. Furthermore, it is limited to exchanges between individuals or companies, on the one hand, and foreign public officials, on the other

hand, in the context of international business transactions. Hence, it deals with the classical case of transnational bribery. Within that context, however, the scope is potentially wide. The 1997 OECD Convention not only requires action against the principals involved in bribery, but also against accomplices to the offence. It should be noted that according to the 1997 Commentaries on the OECD Convention (OECD, 1997b),[6] attempts, conspiracies, incitement, aiding and abetting of bribery are punishable only to the extent that such acts are already punishable in the national legal system of a party to the Convention. Thus, on the one hand, there is no requirement for a party to make such acts punishable under its legal system. On the other hand, the Commentaries make plain that the parties to the Convention must aim at a functional equivalence between their laws in this area, allowing countries to work within their legal systems as long as they can achieve the results required by the Convention thereby aiming at reducing unequal application.

Moreover, the Commentaries clarify that certain circumstances are irrelevant to the question of whether or not a crime has been committed. For example, as provided for in article 1(4) of the Commentaries, in circumstances such as, for example, bidding for public projects, bribery is deemed to have been committed even if it is shown that the bribe payer was nevertheless the most qualified bidder and could properly have been awarded the project. Other factors that are regarded as having no bearing on the issue of the commission of the offence under the 1997 OECD Convention include in article 1(7) "the value of the advantage, its results, perceptions of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment in order to obtain or retain…[an]… advantage." (ibid., p.1).

Under the 1997 OECD Convention, the giving of any *undue* advantage in relation to performance of official duties in order *to obtain or retain business or other improper advantage* is prohibited. The question arises as to what constitutes an "undue advantage".[7] The view expressed in article 1(8)

of the Commentaries is that "It is not an offence ... if the advantage was permitted or required by the written law or regulation of the foreign public official's country, including case law" (ibid.). On the other hand, it could be also argued that an advantage is undue if it is provided in order to obtain or retain something to which the party giving the bribe is clearly not entitled. In this connection, article 1(9) of the Commentaries provides that "[s]mall "facilitation" payments do not constitute payments made "to obtain or retain business or other improper advantage" ... and, accordingly, are ... not an offence" (ibid). Such qualifications, as indicated in the Commentaries, seem to be, however, a setback to the goal of a wide scope for the offence.[8]

In the 1999 Council of Europe Criminal Law Convention on Corruption (Criminal Law Convention), the bribery of public officials is extensively defined in terms of the relevant official that might be involved, at both domestic and international levels (box 3).

Box 3. The Criminal Law Convention on Corruption: defining bribery

"Chapter II - Measures to be taken at national level

Article 2 - Active bribery of domestic public officials

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the promising, offering or giving by any person, directly or indirectly, of any undue advantage to any of its public officials, for himself or herself or for anyone else, for him or her to act or refrain from acting in the exercise of his or her functions.

A**rticle 3 - Passive bribery of domestic public officials**

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the request or receipt by any of its

/...

Box 3 (continued)

public officials, directly or indirectly, of any undue advantage, for himself or herself or for anyone else, or the acceptance of an offer or a promise of such an advantage, to act or refrain from acting in the exercise of his or her functions.

Article 4 - Bribery of members of domestic public assemblies

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the conduct referred to in Articles 2 and 3, when involving any person who is a member of any domestic public assembly exercising legislative or administrative powers.

Article 5 - Bribery of foreign public officials

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the conduct referred to in Articles 2 and 3, when involving a public official of any other State.

Article 6 - Bribery of members of foreign public assemblies

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the conduct referred to in Articles 2 and 3, when involving any person who is a member of any public assembly exercising legislative or administrative powers in any other State.

Article 9 - Bribery of officials of international organisations

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the conduct referred to in Articles 2 and 3, when involving any official or other contracted employee, within the meaning of the staff regulations, of any public international or supranational organisation or body of which the Party is a member, and any person, whether seconded or not, carrying out functions corresponding to those performed by such officials or agents.

/...

Box 3 (concluded)

Article 10 - Bribery of members of international parliamentary assemblies

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the conduct referred to in Article 4 when involving any members of parliamentary assemblies of international or supranational organisations of which the Party is a member.

Article 11 - Bribery of judges and officials of international courts

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the conduct referred to in Articles 2 and 3 involving any holders of judicial office or officials of any international court whose jurisdiction is accepted by the Party."

Source: UNCTAD, 2000a .

The scope of the Criminal Law Convention is broad in that its articles 2 and 3, when taken together, address all potential transactions, whether direct or through third parties, between public officials and private entities. In order to avoid circumvention, the offence under the Criminal Law Convention covers cases in which a payment is in exchange for an act or omission by a public in the exercise of his or her functions, irrespective of whether the public official or an associated third party is the beneficiary of the transaction.

2. The "public official"

The definition of a public official determines, to some degree, the scope and effectiveness of the efforts to combat bribery. The narrower and more technical the definition, the easier it would be to circumvent the law. Thus, in most instruments, the definition of a public official goes beyond titular designations, and includes functional characterizations.

For example, in article 2(a) of the United Nations draft International Agreement on Illicit Payments, "...'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; ...".

The formulation used in the Inter-American Convention is somewhat different, as its definition includes both titular designations (public officials) and persons who perform public functions. Thus, its article provides that:

> " 'Public function' means any temporary or permanent, paid or honorary activity, performed by a natural person in the name of the State or in the service of the State or its institutions, at any level of its hierarchy.
>
> 'Public official', 'government official', or 'public servant' means any official or employee of the State or its agencies, including those who have been selected, appointed, or elected to perform activities or functions in the name of the State or in the service of the State, at any level of its hierarchy."

A more particular definition is included in the 1997 OECD Convention, which in its article 1(4) defines "foreign public official" to mean "any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation; ...".

Another formulation is provided for in the Criminal Law Convention on Corruption, which provides, in Chapter I, article 1:

"a) '*public official*' shall be understood by reference to the definition of '*official*', '*public officer*', '*mayor*', '*minister*' or '*judge*' in the national law of the State in which the person in question performs that function and as applied in its criminal law;

b) the term '*judge*' referred to in sub-paragraph a above shall include prosecutors and holders of judicial offices; ...".

Thus, this instrument defers to the applicable definitions of "public official" under the national laws of its contracting parties, rather than opting for harmonized definition under the Convention.

3. Transnational bribery

Transnational bribery could be defined separately as an offence in a relevant instrument. For example, article VIII of the Inter-American Convention entitled "Transnational Bribery" provides:

> "Subject to its Constitution and the fundamental principles of its legal system, each State Party shall prohibit and punish the offering or granting, directly or indirectly, by its nationals, persons having their habitual residence in its territory, and businesses domiciled there, to a government official of another State, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage, in connection with any economic or commercial transaction in exchange for any act or omission in the performance of that official's public functions."

It should be noted that, under the Inter-American Convention, the definition of transnational bribery includes the same general definition of bribery under its article VI, which is, in article VIII, fashioned to address specifically the international dimension of the general offence. The scope of the offence is, however, narrower than the general offence of bribery

defined in the Convention. Transnational bribery under this Convention addresses *economic or commercial transactions*, i.e. the specific offence focuses on international business. In contrast, articles 5,6, 9-11 of the Criminal Law Convention (box 3), while also providing for specific references to bribery in a transnational context, cover the entire range of circumstances within which a public official acts in the exercise of his or her functions.

It is also possible to establish the scope of the general definition of bribery in such a way as to address the offence in its transnational context. Examples include, as previously discussed, the United Nations draft International Agreement on Illicit Payments and the 1997 OECD Convention.

* * *

The review of the foregoing international agreements leads to a number of general observations. First, the definition of the offence of bribery, including transnational bribery, includes a number of elements, namely: (1) an offer or demand (2) to or by a public official (3) of any payment or other benefit (4) by a person or corporation (5) for undue consideration of that official's (non) performance of duties. Secondly, the definition of a public official includes both a subjective element in terms of qualifications and an objective element in terms of the exercise of public functions. Thirdly, the scope of the offence of bribery is usually wide, as it may cover direct and indirect transactions, regardless of whether or not payments or advantages go to the principals or to third parties. Fourthly, in a number of cases, the instruments focus only on transnational bribery, i.e. on foreign public officials within the context of international business transactions.

B. Jurisdiction

The typical grounds upon which States can assert jurisdiction to address transnational bribery are based upon the principles of territoriality and nationality. Essentially,

the territoriality principle stands for the proposition that a State can act, exclusively of other States, but within the bounds of international law, to regulate or otherwise address any matter that occurs within its territory. This ground of jurisdiction is sometimes extended to cover instances in which acts that do not originate within the territory of a State have, nevertheless, significant effects in its territory; this is known as the "effects doctrine". The nationality principle, on the other hand, asserts that a State can regulate or otherwise address, within the bounds of international law, the conduct of its nationals, regardless of their location or the location where their conduct originate.

While all States base their criminal jurisdiction on territoriality (that is in respect of offences committed within their territory including in some cases those deemed to have been committed in their territory because of the effects caused therein), many States do rely also on nationality as a basis of jurisdiction, which makes it possible to prosecute nationals for offences committed by them abroad. Even those States that extend their jurisdiction over their nationals abroad in criminal matters tend to do so only in respect of certain crimes or in special circumstances.

Thus, article 4 of the United Nations draft International Agreement on Illicit Payments provides:

> "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, paragraph 1 (a) relating to any payment, gift or other advantage in connection 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 these have effects within 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."

Thus, the draft International Agreement provides for territorial jurisdiction in article 4(1)(a), and splits nationality jurisdiction in sections (b) and (c) of article 4(1). Its article 4(1)(d) establishes jurisdiction on the basis of the "effects doctrine". The provisions in article 4(1) suggest that, if either active or passive bribery is committed entirely, or has its effects, in the territory of a State, that State shall have jurisdiction to prosecute. Interestingly however, with respect to jurisdiction on the grounds of nationality, there is a distinction between public officials and other nationals of a State. Section (b) provides that a State shall establish jurisdiction over passive bribery offences that involve its public officials, presumably irrespective of where such offences have been committed. On the other hand, section (c) retains an element of territoriality by providing that for other nationals of a State – including international business actors – involved in active bribery, such jurisdiction shall be established in so far as any component of the offence is connected with the territory of that State. Thus, a narrower commitment seems to exist for a State to establish jurisdiction over its international business actors who are involved in active bribery, as compared to its public officials involved in passive bribery. Finally, article 4(2) provides for other grounds of establishing jurisdiction pursuant to national criminal laws of a State.

The Inter-American Convention also provides for jurisdiction on territoriality (including the "effects doctrine") and nationality grounds in its articles IV and V (1) and

(2). In its article V (4), the Convention preserves other jurisdictional grounds that result from "the application of any other rule of criminal jurisdiction established by a State Party under its domestic law". An interesting additional requirement in this Convention (found also in article 10.3 of the 1997 OECD Convention) is that in article V (3), each State undertakes to "adopt such measures as may be necessary to establish its jurisdiction over the offenses it has established in accordance with this Convention when the alleged criminal is present in its territory and it does not extradite such person to another country on the ground of the nationality of the alleged criminal". In effect, this article provides a State with a choice either to extradite an alleged offender or, failing that, to establish jurisdiction to prosecute. Article V adopts a broad definition of jurisdiction in order to secure proper prosecution of the alleged criminals.

Article 4 of the 1997 OECD Convention provides for jurisdiction on the basis of the principles of territoriality and nationality. It states:

> "1. Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.
>
> 2. Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles."

It should be highlighted that article 4(2) of this Convention does not seem to require the establishment of a new basis of jurisdiction on nationality grounds to prosecute offences that have been committed abroad. This provision requires however any contracting State that relies on nationality jurisdiction in order to prosecute its nationals for criminal offences committed abroad, to do so also as to the offence of bribery of a foreign public official under the Convention,

according to the same principles generally applicable to crimes committed abroad. These principles may typically refer to the requirements of dual criminality, of a minimum penalty as a threshold for prosecution, of a denunciation by the victim, etc. Article 4(4) of the Convention requires each contracting party to "review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials and, if it is not, shall take remedial steps".

In the 1997 OECD Convention, it was recognized that, under some national laws, the exercise of jurisdiction with respect to the bribery of foreign public officials could be subject to the offence being charged within a prescribed time-period from the alleged date of its occurrence (statute of limitations). In such circumstances, article 6 of the 1997 OECD Convention provides that "[a]ny statute of limitations applicable to the offence of bribery of a foreign public official shall allow an adequate period of time for the investigation and prosecution of this offence".

The Criminal Law Convention provides for similar requirements to establish jurisdiction. Its article 17 stipulates:

> "1. Each Party shall adopt such legislative and other measures as may be necessary to establish jurisdiction over a criminal offence established in accordance with Articles 2 to 14 of this Convention where:
>
> a) the offence is committed in whole or in part in its territory;
>
> b) the offender is one of its nationals, one of its public officials, or a member of one of its domestic public assemblies;
>
> c) the offence involves one of its public officials or members of its domestic public assemblies or any person referred to in Articles 9 to 11 who is at the same time one of its nationals. ...

…

4. This Convention does not exclude any criminal jurisdiction exercised by a Party in accordance with national law."

Section 1(c) is interesting in that it extends nationality jurisdiction to cover employees of international organizations. It should be noted however, that, on the one hand, nationality jurisdiction under this Convention could be limited by the contracting States through reservations, as provided for in its article 17(2). However, if a State makes a reservation with respect to its obligations under sections (b) and (c) of article 17(1), it is required, under article 17(3), to prosecute an accused individual if that State refuses to extradite the accused after having received a request from another contracting State. Finally, it should also be noted that article 16 of the Convention states that its provisions "shall be without prejudice to the provisions of any Treaty, Protocol or Statute, as well as their implementing texts, as regards the withdrawal of immunity". Thus, the Convention does not directly deal with one potential obstacle to the exercise of jurisdiction to prosecute the higher level foreign public office holders who may enjoy certain immunities from prosecution. Instead, it defers to relevant rules provided for in other international instruments.

* * *

There may be situations in which more than one State exercise (or wish to exercise) their jurisdictions with respect to the occurrence of the same act of bribery. For example, a State in which the actual transaction has occurred may wish to prosecute both its public official and an officer of a TNC involved in an illicit payment transaction. At the same time, however, the home country of the TNC involved may also wish to prosecute the accused officer. The issue will thus arise as to which country should prosecute the TNC officer charged with the same offence. The 1997 OECD Convention has addressed this issue in its Article 4(3):

> "When more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution."

Finally, there may be circumstances in which one State seeks to extend unilaterally the reach of its laws against transnational bribery over non-nationals or acts that have occurred outside of its territory. Such attempts to exercise extraterritorial jurisdiction were addressed in the United Nations General Assembly resolution 51/191, where it was stated:

> "11. Actions taken in furtherance of the present Declaration shall respect fully the national sovereignty and territorial jurisdiction of Member States, ...;
>
> 12. Member States agree that actions taken by them to establish jurisdiction over acts of bribery of foreign public officials in international commercial transactions shall be consistent with the principles of international law regarding the extraterritorial application of a State's laws."

To summarize, relevant international agreements base the establishment of jurisdiction to prosecute corruption upon a number of factors. First, States are required to establish jurisdiction, possibly taking also into account the "effect doctrine". Secondly, nationality jurisdiction may be required to be established, in addition to territorial jurisdiction, albeit under varying criteria. In some cases, States are required to establish nationality jurisdiction for bribery offences only to the extent that this basis of jurisdiction is recognized in principle, in their legal systems. Thirdly, in the context of transnational bribery, some instruments address the issue of conflicts of jurisdiction in cases that involve the concurrent exercise of jurisdiction by two or more States or the extraterritorial application of the laws of a State. This leads

to issues of international cooperation, which is dealt with in more detail below.[9]

C. International cooperation

As indicated previously, due to the nature of the offence, which involves transactions between actors that are based in different countries, the effective investigation and enforcement of laws that are intended to combat transnational bribery depends, to a large degree, upon appropriate levels of international cooperation. Thus, one of the central aims of international action in this area is to agree on such cooperation, particularly as regards mutual legal assistance and extradition.

Article 9(1) of the United Nations draft International Agreement on Illicit Payments provides that the "Contracting States shall inform each other upon request of measures taken in the implementation of this Agreement". The draft Agreement continues, in its article 10, to outline the areas of cooperation with respect to the exchange of information and, assistance in criminal investigations and proceedings related to the offence. It states:

> "1. Contracting States shall afford one another the greatest possible measure of assistance in connection 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 connection 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."

Article 10(5) of the draft International Agreement requires, among other things, that the information obtained be used "solely for the purposes for which it has been obtained" and otherwise be kept confidential.

With respect to cooperation on extradition matters, Article 11 of the draft International Agreement provides that:

"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."

Sections 2 and 3 of article 11 propose ways by which contracting parties could eliminate the need for establishing the existence of an extradition treaty, or that the offence is considered extraditable *inter se*. The draft International Agreement also requires in its article 5(1) that unless a party extradites an alleged offender, it is obliged to prosecute "without exception". The requirement that a party must either extradite or prosecute is not designed to resolve conflicts of jurisdiction; the purpose of this requirement (*aut dedere aut judicare)* is to ensure that crimes that are considered to be very grave do not go unpunished or, at any rate, unprosecuted.

The Inter-American Convention requires, in Article VII, that the parties "facilitate cooperation among themselves pursuant to this Convention". Article XIII of the Convention provides for cooperation on extradition, and articles XIV through XVIII comprehensively provide for mutual assistance and cooperation (box 4).

Box 4. Inter-American Convention against Corruption: provisions on international cooperation

Article XIII
Extradition

"1. This article shall apply to the offenses established by the States Parties in accordance with this Convention.

2. Each of the offenses to which this article applies shall be deemed to be included as an extraditable offense in any extradition treaty existing between or among the States Parties. The States Parties undertake to include such offenses as extraditable offenses in every extradition treaty to be concluded between or among them.

3. If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it does not have an extradition treaty, it may consider this Convention as the legal basis for extradition with respect to any offense to which this article applies.

/...

Box 4 (continued)

4. States Parties that do not make extradition conditional on the existence of a treaty shall recognize offenses to which this article applies as extraditable offenses between themselves.

5. Extradition shall be subject to the conditions provided for by the law of the Requested State or by applicable extradition treaties, including the grounds on which the Requested State may refuse extradition.

6. If extradition for an offense to which this article applies is refused solely on the basis of the nationality of the person sought, or because the Requested State deems that it has jurisdiction over the offense, the Requested State shall submit the case to its competent authorities for the purpose of prosecution unless otherwise agreed with the Requesting State, and shall report the final outcome to the Requesting State in due course.

1. Subject to the provisions of its domestic law and its extradition treaties, the Requested State may, upon being satisfied that the circumstances so warrant and are urgent, and at the request of the Requesting State, take into custody a person whose extradition is sought and who is present in its territory, or take other appropriate measures to ensure his presence at extradition proceedings.

Article XIV

Assistance and Cooperation

1. In accordance with their domestic laws and applicable treaties, the States Parties shall afford one another the widest measure of mutual assistance by processing requests from authorities that, in conformity with their domestic laws, have the power to investigate or prosecute the acts of corruption described in this Convention, to obtain evidence and take other necessary action to facilitate legal proceedings and measures regarding the investigation or prosecution of acts of corruption.

/…

Box 4 (continued)

2. The States Parties shall also provide each other with the widest measure of mutual technical cooperation on the most effective ways and means of preventing, detecting, investigating and punishing acts of corruption. To that end, they shall foster exchanges of experiences by way of agreements and meetings between competent bodies and institutions, and shall pay special attention to methods and procedures of citizen participation in the fight against corruption.

Article XV

Measures Regarding Property

1. In accordance with their applicable domestic laws and relevant treaties or other agreements that may be in force between or among them, the States Parties shall provide each other the broadest possible measure of assistance in the identification, tracing, freezing, seizure and forfeiture of property or proceeds obtained, derived from or used in the commission of offenses established in accordance with this Convention.

2. A State Party that enforces its own or another State Party's forfeiture judgment against property or proceeds described in paragraph 1 of this article shall dispose of the property or proceeds in accordance with its laws. To the extent permitted by a State
Party's laws and upon such terms as it deems appropriate, it may transfer all or part of such property or proceeds to another State Party that assisted in the underlying investigation or proceedings.

Article XVI

Bank Secrecy

1. The Requested State shall not invoke bank secrecy as a basis for refusal to provide the assistance sought by the Requesting State. The Requested State shall apply this article in accordance with its domestic law, its procedural provisions, or bilateral or multilateral agreements with the Requesting State.

/…

Box 4 (concluded)

2. The Requesting State shall be obligated not to use any information received that is protected by bank secrecy for any purpose other than the proceeding for which that information was requested, unless authorized by the Requested State.

ARTICLE XVII
Nature of the Act

For the purposes of articles XIII, XIV, XV and XVI of this Convention, the fact that the property obtained or derived from an act of corruption was intended for political purposes, or that it is alleged that an act of corruption was committed for political motives or purposes, shall not suffice in and of itself to qualify the act as a political offense or as a common offense related to a political offence.

ARTICLE XVIII
Central Authorities

1. For the purposes of international assistance and cooperation provided under this Convention, each State Party may designate a central authority or may rely upon such central authorities as are provided for in any relevant treaties or other agreements.

2. The central authorities shall be responsible for making and receiving the requests for assistance and cooperation referred to in this Convention.

3. The central authorities shall communicate with each other directly for the purposes of this Convention."

Source: UNCTAD, 2000a.

Paragraph 8 of the United Nations General Assembly resolution 51/191 provides, in similar fashion, that States should:

> "cooperate and afford one another the greatest possible assistance in connection with criminal investigations

and other legal proceedings brought in respect of corruption and bribery in international commercial transactions. Mutual assistance shall include, ...:

(a) Production of documents and other information, taking of evidence and service of documents relevant to criminal investigations and other legal proceedings;

(b) Notice of the initiation and outcome of criminal proceedings concerning bribery in international commercial transactions to other States that may have jurisdiction over the same offence;

(c) Extradition proceedings where and as appropriate; ...".

The resolution continues, in paragraph 10, that States should "ensure that bank secrecy provisions do not impede or hinder criminal investigations or other legal proceedings relating to corruption, bribery or related illicit practices in international commercial transactions, and that full cooperation is extended to Governments that seek information on such transactions".

The first official OECD instrument that addressed the need for international cooperation on transnational bribery was the 1997 Revised Recommendation of the Council on Combating Bribery in International Business Transactions (OECD, 1997c).[10] The Council recommended that member countries cooperate on investigations and other legal proceedings through sharing of information (spontaneous or upon request), provision of evidence and extradition (section VII). The members were urged to provide for such cooperation in their national laws and international agreements (ibid.). In the 1997 OECD Convention that followed, these recommendations were reflected in its articles 9 "Mutual Legal Assistance" and 10 "Extradition". A unique feature of the Convention is cooperation on monitoring the implementation of the Convention by the contracting parties

through the establishment of a specific follow-up mechanism. In this connection, article 12 of the Convention provides:

"**Article 12 - Monitoring and Follow-up**

> The Parties shall co-operate in carrying out a programme of systematic follow-up to monitor and promote the full implementation of this Convention. Unless otherwise decided by consensus of the Parties, this shall be done in the framework of the OECD Working Group on Bribery in International Business Transactions and according to its terms of reference, or within the framework and terms of reference of any successor to its functions, and Parties shall bear the costs of the programme in accordance with the rules applicable to that body."

Thus, in accordance to its mandate under Article 12, and its detailed terms of reference, the Working group is evaluating the compliance of the contracting parties with the obligations laid down in the text, as well as the adequacy of enforcement actions taken by them. For a number of member countries, this evaluation has already taken place and a second phase involving on site evaluation of enforcement of such laws is starting (OECD,2000c).

Another initiative in this direction was taken by the Council of Europe in 1995, through the establishment of a Multidisciplinary Group on Corruption (GMC) (Council of Europe, 1999a) which instituted the "Group of States against Corruption" (GRECO) (Council of Europe, 2000). GRECO's main task is the monitoring of member States' compliance with international legal instruments adopted in pursuance of the Programme of Action against Corruption of the Council (Council of Europe, 1999b) decided upon in 1994, through evaluation procedures, country visits by evaluation teams, and the adoption of reports.

Further examples are the follow-up mechanism set up by the States Parties to the Inter-American Convention against Corruption to consider the way States parties are

implementing the Convention and the extensive treatment of the issues connected with international cooperation in the Criminal Law Convention (box 5).

Box 5. Criminal Law Convention on Corruption: provisions on international cooperation

"**Article 21 - Co-operation with and between national authorities**

Each Party shall adopt such measures as may be necessary to ensure that public authorities, as well as any public official, co-operate, in accordance with national law, with those of its authorities responsible for investigating and prosecuting criminal offences:

(a) by informing the latter authorities, on their own initiative, where there are reasonable grounds to believe that any of the criminal offences established in accordance with Articles 2 to 14 has been committed, or

(b) by providing, upon request, to the latter authorities all necessary information.

Chapter IV – International co-operation

Article 25 - General principles and measures for international co-operation

1. The Parties shall co-operate with each other, in accordance with the provisions of relevant international instruments on international co-operation in criminal matters, or arrangements agreed on the basis of uniform or reciprocal legislation, and in accordance with their national law, to the widest extent possible for the purposes of investigations and proceedings concerning criminal offences established in accordance with this Convention.

2. Where no international instrument or arrangement referred to in paragraph 1 is in force between Parties, Articles 26 to 31 of this chapter shall apply.

3. Articles 26 to 31 of this chapter shall also apply where they are more favourable than those of the international instruments or arrangements referred to in paragraph 1.

/...

Box 5 (continued)

Article 26 - Mutual assistance

1. The Parties shall afford one another the widest measure of mutual assistance by promptly processing requests from authorities that, in conformity with their domestic laws, have the power to investigate or prosecute criminal offences established in accordance with this Convention.

2. Mutual legal assistance under paragraph 1 of this article may be refused if the requested Party believes that compliance with the request would undermine its fundamental interests, national sovereignty, national security or ordre public.

3. Parties shall not invoke bank secrecy as a ground to refuse any co-operation under this chapter. Where its domestic law so requires, a Party may require that a request for co-operation which would involve the lifting of bank secrecy be authorised by either a judge or another judicial authority, including public prosecutors, any of these authorities acting in relation to criminal offences.

Article 27 - Extradition

1. The criminal offences established in accordance with this Convention shall be deemed to be included as extraditable offences in any extradition treaty existing between or among the Parties. The Parties undertake to include such offences as extraditable offences in any extradition treaty to be concluded between or among them.

2. If a Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another Party with which it does not have an extradition treaty, it may consider this Convention as the legal basis for extradition with respect to any criminal offence established in accordance with this Convention.

3. Parties that do not make extradition conditional on the existence of a treaty shall recognise criminal offences established in accordance with this Convention as extraditable offences between themselves.

/...

Box 5 (continued)

4. Extradition shall be subject to the conditions provided for by the law of the requested Party or by applicable extradition treaties, including the grounds on which the requested Party may refuse extradition.

5. If extradition for a criminal offence established in accordance with this Convention is refused solely on the basis of the nationality of the person sought, or because the requested Party deems that it has jurisdiction over the offence, the requested Party shall submit the case to its competent authorities for the purpose of prosecution unless otherwise agreed with the requesting Party, and shall report the final outcome to the requesting Party in due course.

Article 28 - Spontaneous information

Without prejudice to its own investigations or proceedings, a Party may without prior request forward to another Party information on facts when it considers that the disclosure of such information might assist the receiving Party in initiating or carrying out investigations or proceedings concerning criminal offences established in accordance with this Convention or might lead to a request by that Party under this chapter.

Article 29 - Central authority

1. The Parties shall designate a central authority or, if appropriate, several central authorities, which shall be responsible for sending and answering requests made under
this chapter, the execution of such requests or the transmission of them to the authorities competent for their execution.

2. Each Party shall, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, communicate to the Secretary General of the Council of Europe the names and addresses of the authorities designated in pursuance of paragraph 1 of this article.

/...

Box 5 (concluded)

Article 30 - Direct communication

1. The central authorities shall communicate directly with one another.

2. In the event of urgency, requests for mutual assistance or communications related thereto may be sent directly by the judicial authorities, including public prosecutors, of the requesting Party to such authorities of the requested Party. In such cases a copy shall be sent at the same time to the central authority of the requested Party through the central authority of the requesting Party.

3. Any request or communication under paragraphs 1 and 2 of this article may be made through the International Criminal Police Organisation (Interpol).

4. Where a request is made pursuant to paragraph 2 of this article and the authority is not competent to deal with the request, it shall refer the request to the competent national authority and inform directly the requesting Party that it has done so.

5. Requests or communications under paragraph 2 of this article, which do not involve coercive action, may be directly transmitted by the competent authorities of the requesting Party to the competent authorities of the requested Party.

6. Each State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, inform the Secretary General of the Council of Europe that, for reasons of efficiency, requests made under this chapter are to be addressed to its central authority.

Article 31 - Information

The requested Party shall promptly inform the requesting Party of the action taken on a request under this chapter and the final result of that action. The requested Party shall also promptly inform the requesting Party of any circumstances which render impossible the carrying out of the action sought or are likely to delay it significantly."

Source: UNCTAD, 2000a.

Efforts by Governments with respect to combating transnational bribery are noted, with approval, in the 1999 revised ICC Rules and Recommendations on Extortion and Bribery in International Business Transactions. The Recommendation provides, under the subheading "cooperation in law enforcement" that "Governments should agree, under appropriate provisions for confidentiality, and in conformity with the OECD Convention, to exchange through law enforcement agencies relevant and material information for the purpose of criminal investigation and prosecution of cases of extortion and bribery. They should also continue to cooperate bilaterally on matters involving extortion and bribery, on the basis of treaties providing for assistance in judicial and penal prosecution matters'". Moreover, particular attention is drawn to the role of international financial institutions in this respect. Thus, it is recommended that:

> "International financial institutions, e.g., the World Bank, the European Bank for Reconstruction and Development, should aim to make a significant contribution to the reduction of extortion and bribery in international business transactions. They should take all reasonable steps to ensure that corrupt practices do not occur in connection with projects which they are financing. Similarly, in negotiating cooperation agreements with non-member countries, whether countries with economies in transition or developing nations, the governing or coordinating bodies of the European Union, NAFTA, ASEAN and other regional institutions, should seek to satisfy themselves that appropriate legislation and administrative machinery to combat extortion and bribery exists in the countries concerned."

* * *

The foregoing review of provisions relating to international cooperation shows that the scope of such cooperation is intended to be wide. Again, it should be noted that it is taking place in the wider context of provisions

in treaties dealing with suppression of crime. With respect to extradition, the provisions in IIAs and other relevant international agreements require States to recognize bribery as an extraditable offence. They also provide grounds upon which States could forego the necessity of the existence of extradition treaties prior to honouring a request for extradition from another party. In addition, some agreements require that a State that refuses to extradite must then prosecute. With respect to other areas of cooperation, States undertake to provide information, either spontaneously or upon request, that might help another State in the initiation, investigation and prosecution of suspected cases of bribery. Moreover, States are required to render assistance to other States in the investigation of alleged instances of bribery, as well as the gathering and confiscation of evidence. It should be emphasized, however, that most instruments provide that States must undertake such requirements for international cooperation only to the extent that they are able to do so under their own domestic laws. On the other hand, in most cases, States may not invoke their bank secrecy laws as a ground to refuse such cooperation. In some cases, States may refuse a request for cooperation on the basis that the request in contrary to its national interests or on some other similar grounds. Such limitations diminish, of course, the effectiveness of provisions intended to secure international cooperation on such matters.

D. Enforcement and sanctions

The credibility of any criminal law system is in its enforcement mechanisms and the effectiveness of its sanctions in terms of deterrence. With respect to transnational bribery, the issue requires careful analysis to ensure an even application of laws *vis-à-vis* all parties involved. Otherwise, countries might not wish to subject their nationals to criminal sanctions in a non-reciprocal fashion. Furthermore, standards that differ significantly between countries could place international business at a competitive disadvantage, depending on whether or not they are located in jurisdictions with tougher enforcement practices than their competitors.

Article 3 of the United Nations draft International Agreement on Illicit Payments requires its contracting parties to "take all practicable measures for the purpose of preventing the offences mentioned in article 1". It is understood that this would include the enforcement of their criminal laws by way of prosecution of the offence of bribery, as criminal prosecution could have a considerable deterrent effect on future conduct. With respect to sanctions, article 8 provides:

> "[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.]"

The Inter-American Convention, in its Article XV related to international cooperation, makes reference to sanctions in the form of "freezing, seizure and forfeiture of property or proceeds obtained, derived from or used in the commission of offences established in accordance with" the Convention. The manner in which forfeited property should be disposed is to be in accordance with national laws.

The United Nations General Assembly resolution 51/191 in its paragraph 1 urges countries to "pursue effective enforcement of existing laws prohibiting bribery in international commercial transactions, to encourage the adoption of laws for those purposes where they do not exist, and to call upon private and public corporations, including transnational corporations, and individuals within their jurisdiction engaged in international commercial transactions to promote the objectives of..." the Resolution. In its paragraph 4, the Resolution further exhorts countries to "deny, in

countries that do not already do so, the tax deductibility of bribes paid by any private or public corporation or individual of a State to any public official or elected representative of another country and, to that end, to examine their respective modalities for doing so, …". Finally, Governments are requested in paragraph 10 to "ensure that bank secrecy provisions do not impede or hinder criminal investigations or other legal proceedings relating to corruption, bribery or related illicit practices in international commercial transactions, …".

With particular reference to the bribery of foreign public officials, the 1997 OECD Convention addresses, in its articles 3 and 5, enforcement and sanctions issues, as follows:

"**Article 3 - Sanctions**

1. The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties. The range of penalties shall be comparable to that applicable to the bribery of the Party's own public officials and shall, in the case of natural persons, include deprivation of liberty sufficient to enable effective mutual legal assistance and extradition.

2. In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials.

3. Each Party shall take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation

or that monetary sanctions of comparable effect are applicable.

4. Each Party shall consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official.

...

Article 5 - Enforcement

Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved."

The Convention addresses the issues in a relatively comprehensive fashion. In addition to covering natural persons, the sanctions provisions specifically address juridical persons. It is interesting to note that sanctions against the bribery of foreign public officials cannot exceed those against domestic officials. The consideration of national economic interests in the enforcement of the anti-bribery laws under the Convention is explicitly forbidden, as are considerations with respect to international relations or the identity and presumably, the status of an alleged offender. In a connected development, the OECD Recommendation of the Council on the Tax Deductiblity of Bribes to Foreign Public Officials (OECD, 1996) urges, in its paragraph I, that "Member countries which do not disallow the deductibility of bribes to foreign public officials re-examine such treatment with the intention of denying this deductibility. Such action may be facilitated by the trend to treat bribes to foreign public officials as illegal".[11]

Article 19 of the Criminal Law Convention provides for sanctions that are rather similar to those in article 3 of the 1997 OECD Convention. An interesting provision in the Criminal Law Convention is the issue of the protection

of informants, or "whistleblowers", which is generally not explicitly mentioned in other IIAs. Thus, article 22 provides:

> "**Article 22 - Protection of collaborators of justice and witnesses**
>
> Each Party shall adopt such measures as may be necessary to provide effective and appropriate protection for:
>
> a) those who report the criminal offences established in accordance with Articles 2 to 14 or otherwise co-operate with the investigating or prosecuting authorities;
>
> b) witnesses who give testimony concerning these offences."

Article 23 of the Criminal Law Convention requires parties to adopt measures in accordance with their laws to facilitate gathering of evidence, including bank records. Parties are also required under this article to adopt measures allowing the freezing and seizure of instrumentalities and proceeds of corruption. It further provides that bank secrecy laws should not be used to thwart investigations or the freezing and seizure of proceeds of corruption.

The 1999 revised ICC Rules and Recommendations on Extortion and Bribery in International Business Transactions provide, in part I, that "Governments, in conformity with their jurisdictional and other basic legal principles, should ensure:

i) that adequate mechanisms exist for surveillance and investigation, and

ii) that those who offer, demand, solicit or receive bribes in violation of their laws are subject to prosecution with appropriate penalties."

As to civil remedies, the 1999 Civil Law Convention on Corruption of the Council of Europe (Council of Europe, 2001) provides for the annulment of contracts having bribery as their object. Under the Convention, a party to a contract is entitled to ask from a competent domestic court the annulment of the contract when its consent has been affected by bribery, without prejudice to a claim for damages.

* * *

The enforcement of criminal laws against transnational bribery, and imposition of sanctions that are intended to discourage such conduct are considered to be *sine qua non* for any framework international agreement to combat bribery. Therefore, such agreements usually carry with them obligations for States to ensure that those involved in bribery are subject to criminal prosecution. To this end, most instruments require States to provide, within the limits of their national legal systems, adequate institutional capacity for the surveillance and investigation of transactions that provide the requisite context for bribery. Moreover, similarly to the case of international cooperation, States are proscribed from raising their bank secrecy laws as justification for their failure to investigate and prosecute instances of alleged bribery. In some agreements, there are innovative provisions that require States to protect those who report violations of laws on bribery or testify in related prosecutions that may ensue. Furthermore, it is sometimes made clear that States may not be influenced by considerations of national economic interest or other similar issues when deciding on whether or not to investigate or prosecute an alleged case of bribery.

With respect to sanctions, States generally undertake to provide for effective, proportionate and dissuasive criminal penalties. However, to ensure that the enforcement of anti-bribery laws would not result in competitive disadvantages between enterprises, some agreements require that the relevant procedures and penalties be similar to those that are applicable a State's own nationals. Penalties that are considered as

being effective include the deprivation of liberty and of property, the latter being subject to freezing, seizure, confiscation, nullification and ultimately, disposition, should it be found to represent the proceeds of a corrupt transaction. A related measure is to disallow expenses related to bribery that are claimed as a tax deduction. States also recognize that, in addition to sanctions that are criminal in nature, non-penal measures that impose obligations on business enterprises are also of fundamental importance in efforts to counter transnational bribery. This is discussed in some detail below.

E. The responsibility of TNCs

As discussed previously, enterprises, and particularly TNCs, have an important role to play in preventing transnational bribery. In this respect, in addition to refraining from offering or paying bribes to public officials, appropriate management practices need to be employed, including transparency in accounting and disclosure in relevant corporate reports.

Article 20 of the 1983 United Nations draft Code of Conduct on Transnational Corporations specifically addresses the obligation of TNCs with respect to the bribery of public officials. It provides:

> "[Transnational corporations shall refrain, in their transactions, from the offering, promising or giving of any payment, gift or other advantage to or for the benefit of a public official as consideration for performing or refraining from the performance of his duties in connection with those transactions..."

The third paragraph of this article of the draft Code specifically refers to the United Nations draft International Agreement on Illicit Payments and provides that the principles set out in the latter should apply in the area of abstention from corrupt practices included in the former. Indeed, the way in which the offence is defined in article 20 is very similar

to article 1.1(a) of the United Nations draft International Agreement on Illicit Payments.

The 2000 OECD Guidelines for Multinational Enterprises (The Guidelines) (OECD, 2000a) include a chapter that deals exclusively with the responsibility of TNCs in the fight against bribery (box 6).

Box 6. OECD Guidelines for Multinational Enterprises on bribery

"**VI. Combating Bribery**

Enterprises should not, directly or indirectly, offer, promise, give, or demand a bribe or other undue advantage to obtain or retain business or other improper advantage. Nor should enterprises be solicited or expected to render a bribe or other undue advantage. In particular, enterprises should:

1. Not offer, nor give in to demands, to pay public officials or the employees of business partners any portion of a contract payment. They should not use subcontracts, purchase orders or consulting agreements as means of channelling payments to public officials, to employees of business partners or to their relatives or business associates.

2. Ensure that remuneration of agents is appropriate and for legitimate services only. Where relevant, a list of agents employed in connection with transactions with public bodies and state-owned enterprises should be kept and made available to competent authorities.

3. Enhance the transparency of their activities in the fight against bribery and extortion. Measures could include making public commitments against briberyand extortion and disclosing the management systems the company has adopted in order to honour these commitments. The enterprise should also foster openness and dialogue with the public so as to promote its awareness of and co-operation with the fight against bribery and extortion.

/...

Box 6 (concluded)

4. Promote employee awareness of and compliance with company policies against bribery and extortion through appropriate dissemination of these policies and through training programmes and disciplinary procedures.

5. Adopt management control systems that discourage bribery and corrupt practices, and adopt financial and tax accounting and auditing practices that prevent the establishment of "off the books" or secret accounts or the creation of documents which do not properly and fairly record the transactions to which they relate.

6. Not make illegal contributions to candidates for public office or to political parties or to other political organisations. Contributions should fully comply with public disclosure requirements and should be reported to senior management."

Source: OECD, 2000a.

In addition, paragraph 9 of chapter II of the Guidelines urges TNCs to "[r]efrain from discriminatory or disciplinary action against employees who make *bona fide* reports to management or, as appropriate, to the competent public authorities, on practices that contravene the law, the *Guidelines* or the enterprise's policies" (ibid.). As indicated in the commentary on the Guidelines, this provision is particularly relevant to efforts to combat bribery. Thus, the OECD anti-corruption agenda focuses on combating the "supply-side" of transnational bribery, i.e. it seeks to eliminate bribes to foreign public officials by requiring each member country to take responsibility for subjecting the relevant activities of its TNCs that occur in its territory to criminal prosecution under the OECD anti-bribery convention, while, at the same time, encouraging TNCs to comply with the standards contained in the Guidelines for Multinational Enterprises. The 2000 Guidelines not only recommend that enterprises refrain from paying bribes, but that they also abstain from other improper

conduct in their dealing with public officials that could affect the latter's impartiality, as well as the transparency and legitimacy of the administrative and political processes of their countries.

A number of NGOs have also addressed the responsibility of TNCs in refraining from, and combating, bribery. For example, part II of the 1999 revised ICC Rules and Recommendations on Extortion and Bribery in International Business Transactions provides that TNCs should be guided by the principle that "[a]ll enterprises should conform to the relevant laws and regulations of the countries in which they are established and in which they operate, and should observe both the letter and the spirit of these Rules of Conduct". In addition, the ICC instrument provides, also in part II, a number of specific rules for TNCs with respect to transnational bribery (box 7).

Box 7. ICC's basic rules of conduct to combat extortion and bribery

"…

Article 2. Bribery and "Kickbacks"

a) No enterprise may, directly or indirectly, offer or give a bribe and any demands for such a bribe must be rejected.

b) Enterprises should not (i) kick back any portion of a contract payment to employees of the other contracting party, or (ii) utilize other techniques, such as subcontracts, purchase orders or consulting agreements, to channel payments to government officials, to employees of the other contracting party, their relatives or business associates.

Article 3. Agents

Enterprises should take measures reasonably within their power to ensure:

a) that any payment made to any agent represents no more than an appropriate remuneration for legitimate services rendered by such agent;

/…

Box 7 (continued)

b) that no part of any such payment is passed on by the agent as a bribe or otherwise in contravention of these Rules of Conduct; and that they maintain a record of the names and terms of employment of all agents who are retained by them in connection with transactions with public bodies or State enterprises. This record should be available for inspection by auditors and, upon specific request, by appropriate, duly authorized governmental authorities under conditions of confidentiality.

Article 4. Financial Recording and Auditing

a) All financial transactions must be properly and fairly recorded in appropriate books of account available for inspection by boards of directors, if applicable, or a corresponding body, as well as auditors.

b) There must be no "off the books" or secret accounts, nor may any documents be issued which do not properly and fairly record the transactions to which they relate.

c) Enterprises should take all necessary measures to establish independent systems of auditing in order to bring to light any transactions which contravene the present Rules of Conduct. Appropriate corrective action must then be taken.

Article 5. Responsibilities of Enterprises

The board of directors or other body with ultimate responsibility for the enterprise should:

a) take reasonable steps, including the establishment and maintenance of proper systems of control aimed at preventing any payments being made by or on behalf of the enterprise which contravene these Rules of Conduct;

b) periodically review compliance with these Rules of Conduct and establish procedures for obtaining appropriate reports for the purposes of such review; and

/...

Box 7 (concluded)

c) take appropriate action against any director or employee contravening these Rules of Conduct.

Article 6. Political Contributions

Contributions to political parties or committees or to individual politicians may only be made in accordance with the applicable law, and all requirements for public disclosure of such contributions shall be fully complied with. All such contributions must be reported to senior corporate management.

Article 7. Company Codes

These Rules of Conduct being of a general nature, enterprises should, where appropriate, draw up their own codes consistent with the ICC Rules and apply them to the particular circumstances in which their business is carried out. Such codes may usefully include examples and should enjoin employees or agents who find themselves subjected to any form of extortion or bribery immediately to report the same to senior corporate management. Companies should develop clear policies, guidelines, and training programmes for implementing and enforcing the provisions of their codes."

Source: UNCTAD, 2000a.

It should be noted that the introduction to part II indicates that these Rules of Conduct constitute "what is considered good commercial practice in the matters to which they relate but are without direct legal effect". The rules are intended to inspire, as provided for in article 7, company codes of conduct in this respect. As such, they "are intended as a method of self-regulation by international business, and they should also be supported by governments". The introduction also makes clear that in practice, the Rules of Conduct must be read *mutatis mutandis* subject to the individual national legal system within which a TNC operates, as the rules could not derogate from applicable local laws.

Pursuant to the sixth paragraph of the 1985 Global Sullivan Principles of Corporate Social Responsibility, enterprises that have endorsed the Principles will "not offer, pay or accept bribes" (IFESH, 1999a). Under the preamble, these enterprises undertake to "respect the law, and as a responsible member of society ... apply these Principles with integrity consistent with the legitimate role of business" (ibid.). They further commit to the development and implementation of company policies, procedures, training and internal reporting structures to ensure commitment to the Principles throughout their organization. Such reporting structures should include providing the secretariat of the Global Sullivan Principles with an annual letter that will provide examples of "[a]ctivities which demonstrate progress that the enterprise has made in the previous calendar year to live up to its commitment to the Global Sullivan Principles" (IFESH, 1999b). "Focus areas and activities that are planned by the enterprise in support of the Global Sullivan Principles for the coming calendar year" should also be reported in that letter (ibid.).

Another NGO instrument that addresses TNC responsibilities in this area was compiled by the People's Action Network to Monitor Japanese Transnational Corporations Abroad. Part II of the 1998 draft NGO Charter on Transnational Corporations provides, in its paragraph 6 entitled "Ban on political and illegal activities such as bribes", that:

> "The TNC shall not be involved in or conduct any political and illegal activity wherever it operates including bribes to local and/or national governments, to political or administrative figures, or to specific groups or organisations. It shall not unfairly purchase public or private entities for its own benefit."

It is interesting to note that the draft NGO Charter, according to its article 3 in part I, primarily aims at establishing criteria to monitor TNCs by concerned NGOs. In its part III, the draft NGO Charter provides a relatively specific set of

procedures for NGOs to follow in their pursuance of the monitoring of TNC activities.

* * *

Transnational bribery is, in the final analysis, mostly carried out on behalf of companies through the use of their funds and to their advantage. At times, companies might be the instigators, whereas at other times, they might feel that they have no other option but to yield to illicit demands by public officials. Thus, the policing and sanctioning of both companies and public officials involved is the primary objective of international agreements in this area. Most agreements that deal with transnational bribery provide for a definition of the offence, either by providing a distinct definition or by establishing the scope of the offence of bribery in such a way as to include (or limit it to) its transnational dimension. In order to avoid circumvention, the offences target not only the principals in corrupt transactions, but all those the are involved in its realization. This includes intermediaries, wherever they might be located, as well as those that are the actual recipients of the undue advantages, so long as such advantages are the *quid pro quo* for the improper act of a public official.

An important provision, aimed at making enforcement more effective, is article 7 of the 1997 OECD Convention on the application of anti-money laundering legislation of all contracting States to bribe payments:

> " Each Party which has made bribery of its own public official a predicate offence for the purpose of the application of its money laundering legislation shall do so on the same terms for the bribery of a foreign public official, without regard to the place where the bribery occurred."

International anti-bribery agreements seek to obtain the maximum possible latitude for each State party to be able to exercise jurisdiction in the investigation and prosecution of instances of transnational corruption. Thus, they require

countries to establish their jurisdiction to prosecute such transactions on the basis of the concepts of territoriality (including the "effects doctrine") and nationality, as well as any other basis that is available under their national legal systems. At the same time, international agreements include provisions with respect to international cooperation to minimize conflicts of jurisdiction, in terms of both the simultaneous exercise of jurisdiction by two or more States and extra-territorial application of the laws of one State. Indeed, a particular feature of transnational bribery is that, in a given case, elements of a transaction take place in at least two, but quite possibly three or more countries. Thus, international agreements in this area provide for international cooperation not only as regards to conflicts of jurisdiction, but also with respect to the investigation and prosecution of alleged offences, extradition of the suspected perpetrators, gathering of evidence, and seizure and confiscation of the proceeds of a transaction.

The touchstone of efforts to combat transnational bribery is in the enforcement and sanctions that are provided in related international instruments. In this respect, international agreements require States that are party to them to take all necessary measures to enforce their laws against corruption. At the same time, provisions are included to ensure that differing substantive or procedural standards between the various national legal systems are not applied in such a way as to result in the competitive disadvantage of their companies. Moreover, in order to increase the effectiveness of international anti-bribery agreements, criminal sanctions are typically complemented by non-penal measures that are addressed to TNCs. These include obligations on the part of TNCs concerning reporting of relevant information to shareholders, as well as rules reporting requirements concerning corporate accounts, bookkeeping and financial statements. Such rules are intended to make concealing illicit transaction more cumbersome and financial irregularities more easily detectable by auditors.

Notes

1 See ECOSOC document E/1979/104, "Report of the Committee on an International Agreement on Illicit Payments", with the text of the draft agreement as an annex. The draft included an article against payments to the apartheid regime of South Africa. This inclusion explains the use of the term "illicit payments" in the title of the agreement otherwise dealing exclusively with bribery under criminal law. The inclusion of that provision, objected to by most industrialized countries, and the link established between these negotiations and the one on a Code of Conduct on TNCs, were the main reasons for the failure of the negotiations which had been otherwise almost completed from a legal point of view.

2 The ICC *ad hoc* Commission prepared "the Recommendations to Combat Extortion and Bribery in Business Transactions". The Commission presented its report to the ICC Council in November of 1977. After further negotiations, the Council adopted the code on 2 December 1977.

3 The offering, promising, or giving of a bribe is sometimes referred to as "active bribery", and the soliciting, demanding, accepting or receiving of a bribe is referred to as "passive bribery".

4 Unless otherwise indicated, all instruments cited herein may be found in UNCTAD, 1996, or UNCTAD, 2000a.

5 The Convention also establishes, in articles VI(1)(c) and (d), that any "Act or omission in the discharge of his duties by a government official or a person who performs public functions for the purpose of illicitly obtaining benefits for himself or for a third party; …", or "The "fraudulent use or concealment of property derived from any of the acts…" defined in article VI, also constitute corruption.

6 The Commentaries were adopted by the Negotiating Conference on 21 November 1997. However, their weight in providing for authoritative interpretations of the Convention, as a part of the "context" of the Convention or *travaux préparatoires* under article 31 and 32 respectively of the 1969 Vienna Convention on the Law of Treaties (United Nations, 1969), is unclear. For the purposes of this paper, they are offered to give guidance in understanding the scope of some of the provisions of the Convention.

7 A related issue that might complicate the analysis is the inclusion, as an element of the definition, that the offence requires a person *intentionally* to offer any undue pecuniary or other advantage to a foreign public official. Conceptually, circumstances in which an offer of an *undue* advantage in exchange for the receipt of an improper advantage might not carry with it the requisite criminal intent are difficult to imagine and**,** therefore, its inclusion would seem to be

superfluous. However, in a number of criminal systems, *mens rea* or a criminal intent is a necessary part of the elements of a crime.

8 It could also be argued that this qualification concerning small facilitation payments is not a set-back of the 1997 OECD Convention, since it reflects the reality that the Convention (which is aimed primarly at corruption in international business transactions) need not address all types of corruption, particulary those that do not involve a discretionary decision on the part of public officials as to whether or not to grant a business deal, contract, license, permit, etc. Many countries have in fact not made use of this exception and have decided to cover even facilitation payments in their national foreign bribery legislation.

9 *It should however be noted that the issues of jurisdiction and international cooperation are not peculiar to the instruments discussed in this paper. They are fairly common to most treaties that are devoted to the suppression of crimes.*

10 The revised Recommendation was adopted by the Council of OECD on 23 May 1997.

11 The Recommendation was adopted by the Council of OECD on 11 April 1996.

Section III

INTERACTION WITH OTHER ISSUES AND CONCEPTS

In general, transnational bribery may be at issue whenever transactions with respect to both the carrying out of an investment and operations in the furtherance of an existing investment require a discretionary act of a public authority, such as an investigation, approval, or authorization. Other acts could include provision of a license, an exemption, or a decision that would implicate resource contributions by a government or simply result in abstention from intervention that may normally be provided for in official rules, procedures or practices. These acts could be in the context of, for example, the admission of foreign companies, granting of incentives, application or enforcement of environmental standards, granting of State contracts, and transfer of funds abroad, all of which are included in the issues and concepts covered in this Series. Although the issue of transnational bribery therefore touches upon a range of issues and concepts, the interactions involved are not extensive, as they do not raise concerns that need to be addressed in provisions in IIAs pertaining to them. In a number of areas, however, interactions are extensive (table 2).

- **Standards of treatment.** The standards of treatment that are typically provided for in IIAs are most-favoured-nation treatment and national treatment (UNCTAD, 1999b and 1999c). In some cases, the standard of fair and equitable treatment is also included in IIAs (UNCTAD, 1999d). In general, these standards seek to protect an investor covered under an IIA from discriminatory and arbitrary governmental measures. Bribery of a public official leads to a decision by that official that is unfair and discriminatory, especially when the competitors of the

Table 2. Interaction across issues and concepts

Concepts in other papers	Illicit payments
Scope and definition	0
Admission and establishment	+
Incentives	+
Investment-related trade measures	+
Most-favoured-nation treatment	++
National treatment	++
Fair and equitable treatment	++
Transfer pricing	0
Competition	0
Technology transfer	0
Employment	0
Social responsibility	++
Taxation	+
Home country measures	+
Host country operational measures	+
Environment	+
Taking of property	++
State contracts	+
Transfer of funds	+
Transparency	++
Dispute settlement (investor-State)	++
Dispute settlement (State-State)	++

Source: UNCTAD.

Key: 0 = negligible or no interaction.
\+ = moderate interaction.
++ = extensive interaction.

bribe giver are thereby put at a disadvantage. Thus, to the extent that a decision arising from an illicit payment could be imputed to a Government as an official measure, such a measure would be prohibited by the relevant treatment standards of an applicable IIA. However, a host country might argue that acts that are the fruits of illegality, such as decisions that are induced by bribery, could not be attributable to it, as such illicit transactions

are manifestly beyond the scope and course of the employment of public officials. Implicit in this argument is that, even in cases in which there is a demand by a public official for a bribe, no foreign investor could reasonably believe that an official has authority to seek a bribe. On the other hand, this position might be difficult for a Government that systematically fails to prosecute corrupt transactions. In other words, it could be argued that the systematic inaction of a Government in enforcing its laws against bribery could be construed as a measure that is tantamount to a tacit endorsement of the bribery transaction, and hence imputable to the Government. Thus, the failure of a Government to take action against bribery could result in claims of its breach of the standards of treatment under an IIA.

- **Social responsibility.** This is an area in which TNCs can make an important contribution to efforts to combat transnational bribery, not only by making their employees aware of the relevant laws, but also by going further and developing and implementing operational standards and practices that are considered to be substantive standards of social responsibility in this area (UNCTAD, forthcoming a).

- **Taking of property.** Certain circumstances could give rise to an interaction between illicit payments and takings of property. For example, a host country may revoke, seize or forfeit a right or property of a foreign investor as a result of a finding that the right or property was the proceed of a corrupt transaction. In this connection, it should be noted that, on the one hand, takings resulting from a violation of criminal laws are not generally considered to be expropriation (UNCTAD, 2000b). On the other hand, the legitimacy of a finding of corruption and the extent, scope or proportionality of a corrective measure may be issues that could require case-by-case analyses to determine whether or not a State has expropriated the property of a foreign investor.

- **Transparency.** Requirements that governmental action and TNC activities be subject to transparency standards provide for the most important interaction indicated in this section. Transparency is an essential element in efforts to prevent bribery in that it facilitates public controls and review of transactions. Adequate accounting standards, both public and private, in home and host countries, coupled with appropriate reporting and disclosure requirements, also decrease the risk that illegal payments could be made in a clandestine way (UNCTAD, forthcoming b). Such policies raise the transaction costs of transnational bribery.

- **Dispute settlement.** It should be noted that public officials include the judiciary; therefore, transactions with judicial officers are subject to anti-bribery laws. It is less clear whether or not arbitrators in dispute settlement panels provided for in IIAs are likewise considered to be public officials. On balance, most of the definitions of a "public official" are wide enough to include arbitrators. Consequently, the bribery of an arbitrator would, in all likelihood, render a decision of that arbitrator in a particular case null and void.

CONCLUSION:

ECONOMIC AND DEVELOPMENT IMPLICATIONS AND POLICY OPTIONS

Certain aspects of a country's administrative and economic organisation may lend themselves to the spread of corruption. These include the lack of checks and balances on the power of officials, a high degree of discretion that public officials are permitted to exercise, and the lack of transparency, monitoring and accountability in administrative processes (OECD, 1997a). Higher levels of corruption, in turn, can adversely affect the level of investment, and particularly of FDI, in a country, possibly lowering it to below levels that would otherwise prevail (Mauro, 1995; Wei, 1997). The effects of bribery on other aspects of international business transactions and TNC activities are also deemed negative. However, it should be noted that the level of corruption is but one factor among the various host country determinants of FDI (UNCTAD, 1998) and, therefore, its significance would depend upon the effect of all other relevant factors. It is also generally recognized that corruption causes competitive disadvantages between market actors – including TNCs, but especially small and medium-sized enterprises (SMEs) – and that it creates uncertainty in relation to their investments. This is of particular importance with respect to IIAs, as these are instruments that seek to contribute to a stable and predictable international investment environment.

In light of the foregoing discussion, the following are a range of policy options that negotiators of IIAs could consider with respect to the issue of transnational bribery:

- **Option 1: No reference to illicit payments.** The great majority of IIAs per se include no reference to combating illicit payments, although in a few, some specific issues have been addressed. Since most efforts with respect to

transnational corruption focus on its criminalization, it could be argued that IIAs per se are not the appropriate instruments to deal with this issue. Rather, Governments would address the issue of transnational bribery in the context of related IIAs.

- **Option 2: Inclusion of a general provision on illicit payments**. Where the parties to an IIA agree to include a reference to transnational bribery to highlight its importance, but do not wish to address this issue more specifically, one option is to introduce it through a general, hortatory clause in the agreement. The content could include, for example, an affirmation of the parties' commitment to prevent and combat transnational bribery, or agreeing that international cooperation in preventing or combating transnational bribery is important to the aims of their IIA. Such general statements could address the parties themselves or TNCs, or both. Example upon which such an approach could be based are article II of the Inter-American Convention section V(1)(a) of the ICC's 1972 Guidelines for International Investment.

- **Option 3: Provisions to clarify the effects of sanctions against illicit payments on obligations under an IIA.** As indicated previously, States undertake obligations to enforce laws that prohibit transnational bribery and take penal and non-penal measures against those engaged in such transactions. Some measures include the arrest, prosecution and incarceration of the individuals involved, which could presumably include foreign investors. Others include the seizure, confiscation and disposition of property that is considered to be the result of bribery, as well as the annulment of any right or advantage acquired through such illicit transactions, all of which could be considered to be a covered investment under an IIA. Thus, there may be instances in which the application of such measures against covered investors or investment might be considered contrary to a State's obligations under an IIA. Take, for example, the right to the unrestricted transfer of funds, which is guaranteed to foreign investors under some IIAs. A host country may, under the application of its criminal laws against transnational bribery, prevent a

transfer of funds that were paid to a foreign investor under a State contract that was granted to that investor through its bribing a public official. The question would then arise whether a State would be in breach of its obligations under an IIA by taking such a measure. States that are parties to an IIA may wish to clarify the effects of these measures arising from the application of their laws against illicit payments on their obligations under the IIA and, where appropriate, provide for exceptions with respect to measures that arise from the application of such laws. For example, with respect to transfer of funds, article 6 of the model BIT of China provides that transfers shall be guaranteed, subject to the laws and regulations of the contracting parties, which might arguably include criminal sanctions. A clearer formulation is provided in articles 1109 (1) and 4(c) of the 1992 North American Free Trade Agreement (NAFTA).

- **Option 4: Linkages to other international anti-bribery agreements.** States may wish to link their IIAs to international agreements dealing specifically with transnational bribery for a number of reasons. For example, in the context of the negotiation of IIAs, they may decide to incorporate therein certain provisions of other international agreements that address transnational bribery issues. It should be noted, however, that this would probably be relevant only in cases in which States wish to address non-criminal measures that are intended to prevent or expose bribery, such as reporting requirements for TNCs. Another example concerns the circumstances discussed under option 3, where potential conflicts might arise between IIAs, on the one hand, and anti-bribery agreements, on the other hand. States might wish to provide for a provision that would, through incorporating the relevant anti-bribery agreements, address any potential conflict by providing for a legal hierarchy between these agreements.

  States could use two techniques to incorporate existing anti-bribery agreements into their IIAs. First, parties could choose to provide a provision that indicates that certain provisions of an anti-bribery agreement is

incorporated, through the attachment of an annex to their IIA, into their IIA. Alternatively, a relevant provision in an IIA could simply refer to the applicable section(s) of an existing anti-bribery agreement, and incorporate the section(s) into the IIA by such reference. The consequence of this incorporation technique is that obligations in the IIA would then mirror those under the incorporated international agreements. Thus, the determination of the nature and scope of application of the attendant obligations depends entirely upon the regime from which they are derived.

With respect to the first example, the incorporation technique **c**ould be particularly helpful in cases in which the parties perceive that negotiations on such issues might be difficult. Equally, it could be used when the negotiating States are already party to international agreements on transnational bribery, as there would be no need to enter into new negotiations in this area. Moreover, in such cases, States might wish to forgo new negotiations on anti-bribery issues for prudential reasons, as the existence of two sets of rules might be a source of confusion and conflict due to inconsistent application. As regards the second example, article 104 of the NAFTA incorporates other international agreements in an attempt to address potential conflicts.

In a combination of options 2 and 4, parties to an IIA could also include a provision on illicit payments in an IIA with a cross reference to obligations under international anti-bribery agreements, which would apply to those parties to IIAs that are also parties to the anti-bribery agreement, and would urge those that are not parties to become parties to the relevant conventions.

- **Option 5: Inclusion of substantive provisions on illicit payments.** States may wish to include in their IIAs substantive provisions that address transnational bribery issues. This might particularly be the case, for example, with respect to non-criminal measures that pertain both to their Governments and to their TNCs. An instrument in which this approach was hinted at is the 1984 Caribean

Community (CARICOM) Guidelines for use in the Negotiation of Bilateral Treaties. In a section entitled "Monitoring", the CARICOM Guidelines provide that a host country "should undertake to do all in its power to ensure" that its investors "be good corporate citizens in CARICOM host countries". Arguably, a component of good corporate citizenship would be abstinence from engaging in transnational bribery. It should be emphasized, however, that the provision is addressed to home countries, which implies that they should take measures to ensure that their TNCs act as good corporate citizens in host countries.

Another example of circumstances under which parties might wish to provide for substantive provisions related to transnational bribery is with respect to international cooperation concerning specific anti-bribery issues that might arise within the context of an IIA. A number of BITs currently include provisions that could be argued as providing the basis of cooperation in such matters. These include, for example, article 12 of the 1994 model BIT of China and article VIII of the 1994 model BIT of the United States. Such provisions in IIAs might fit in well with, and reinforce obligations under, international anti-bribery agreements, should the same countries be parties to both agreements.

Finally, as some international economic agreements, e.g. regional integration agreements, increasingly seek to extend their traditional subject matters beyond the core issues of trade liberalization and investment protection, and in particular to include rights and benefits for TNCs that are enforceable by way of adjudication in international tribunals, Governments may consider it appropriate to embody certain core values and standards in their IIAs to form an essential part of a balanced package of rights and obligations that such instruments provide to host countries, TNCs and their home countries. An analogy might be the TRIPS agreement, which in essence has made the acceptance of basic intellectual property rights a requirement of participation in the WTO system. Moreover – and directly relevant to the issue of transnational bribery

– the parties to the 1994 WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) have also accepted, in article 61, that criminal procedures and penalties should be applied to wilful violations of protected intellectual property rights. In similar fashion, the prevention and prohibition of transnational bribery could be regarded as an essential component of IIAs, at least in terms of non-penal measures intended to prevent and expose related transactions. Related provisions could be formulated in non-compulsory terms or, as in the TRIPS agreement, they could include mandatory obligations on the part of their addressees. Such provisions could be applicable on the basis of reciprocal conditionality, which would provide flexibility. Thus, States could choose to extend investment protection benefits only to investors from States accepting such obligations. Conditionality could also be applied to enterprises, through an appropriate denial-of-benefits clause. This would permit a State to deny the benefits of investment protection to enterprises breaching specified anti-bribery or related standards. In addition, the inclusion of specific provisions prohibiting transnational bribery within a single framework would help to create public confidence that the benefits extended to investors by globalisation would be complemented by a strengthened framework of international cooperation to prevent abuse of the freedoms of the global market.

* * *

It should be noted here that the foregoing options are not intended to provide a comprehensive listing of available options, but merely a possible range. Furthermore, while the options are presented individually, they are not necessarily mutually exclusive and, indeed, hybrids could be considered when addressing bribery matters in the negotiation of IIAs.

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