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COUNCIL

UNITED STATES PROPOSAL ON THE ISSUE OF ILLICIT PAYMENTS

(Note by the Secretary-General)

1. At the meeting of the Executive Committee in Special Session on 28th February and 1st March 1989, the Delegation of the United States proposed the creation of an ad hoc group to examine the feasibility of an international agreement on illicit payments.
2. A text from the United States Delegation which provides background information on this proposal is attached in the Annex.
3. During the discussions in the Executive Committee in Special Session, support was given to the suggestion that the preparation of an inventory of relevant legislation in Member countries might be a first step in examining this issue.
4. The Secretary-General believes that in order to provide a useful basis for further consideration by the Council of the United States proposal, a survey should include a description of national legislation and regulations as well as information on previous work done on this subject on an international level. The Secretariat is prepared to undertake such a task. If the Council so agrees, it would be the Secretary-General's intention to establish a small group of experts from Member countries in order to assist the Secretariat in its work. Such a group could meet at short notice and would, as a first step, prepare a questionnaire to Member countries.
5. Accordingly, the Secretary-General invites the Council to adopt the following draft entry in its Minutes:

"THE COUNCIL

noted the Note by the Secretary-General concerning the United States proposal on the issue of illicit payments [C(89)49] as well as the United States document contained in the Annex thereto."

ANNEX

March 14, 1989

U.S. MISSION TO THE  
ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENTUNITED STATES PROPOSALFOR ANINTERNATIONAL AGREEMENT ON ILLICIT PAYMENTS

During the March 1, 1989, meeting of the Executive Committee in Special Session (ECSS), several delegations requested more information on the United States proposal to create an ad hoc group under the Council to examine the feasibility of an international agreement on illicit payments, with a view towards negotiating a binding agreement among OECD members on that subject. We hope other delegations will find the following information useful.

The 1977 Foreign Corrupt Practices Act (FCPA) is the U.S. law intended to ensure ethical behavior by U.S. persons in international commercial transactions. It prohibits individuals and corporations from bribing a foreign official or political party for the purpose of obtaining or retaining business. Payments that merely facilitate or expedite routine government action are not illegal under the FCPA.

In the 1988 Omnibus Trade and Competitiveness Act, the U.S. Congress modified the FCPA in a number of respects. At the same time, the Congress directed the President to seek to negotiate among OECD countries an international agreement addressing the conduct dealt with in the U.S. law. The Trade Act also provided that the President shall submit a progress report to the Congress by August 1989.

The goal of an international agreement would be to ensure that individuals and enterprises in OECD member states are subject to comparable national legal standards governing bribery in conducting international commercial transactions. The central element of such an agreement would be a binding obligation by members to enact appropriate civil, administrative and criminal penalties to punish their nationals and corporations who commit bribery in connection with such transactions.

Bribery is a problem for many countries, not just those of the OECD. But as the U.S. Congress recognized, the OECD has a long history of setting an example for others. In our view, this organization is well suited to examine this problem. OECD members have a common interest in showing they are committed to ethical business practices abroad by their nationals. Moreover, the OECD has the experience and the facilities to serve as a forum for negotiation of an agreement on illicit payments.

The issue of illicit payments also is relevant to the OECD's overall concern for the developing world. This organization has long recognized the importance of maintaining a corruption-free environment for international commerce. The use of bribery in international commerce not only poses ethical problems, it also hinders the development of international commerce by adding undue transaction costs and restricting the operation of free and open markets.

We have proposed the creation of an ad hoc group rather than taking up this issue in one of the standing committees for a number of reasons. The problem of illicit payments is a broad but discrete subject which touches on the activities of many committees. For example, the Committees on Competition Law and Policy, International Investment and Multinational Enterprises, Trade and Development Assistance all do work related to this problem. Nevertheless, this issue does not fit neatly into any one of these committees, nor can it be dealt with in its entirety by any of them. Moreover, we would not want to divert attention and resources from the important work now going on in these committees.

The issue of illicit payments also needs special expertise not available in any single committee. We would anticipate that the necessary experts -- primarily legal experts -- would come largely from capitals and would have different sorts of expertise from the officials who attend meetings of the standing committees.

In addition, this is a discrete problem upon which expeditious action is both possible and desirable. It would be difficult to fit this issue into the well-established work plan of a standing committee.

We recognize that some members countries have concerns about the jurisdictional reach of their laws and how to reconcile possible differences among our respective national laws on bribery. Some delegations have also raised questions on such issues as how to define illicit payments. These are precisely the kinds of questions we believe can be addressed in discussions in the OECD involving experts from member nations.

The United States believes that an international agreement would serve the purpose of eliminating so far as possible bribery and other payments that are both illegal and costly to enterprises, and that are disruptive to political stability and sound economic development in developing countries.