

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

ILLICIT PAYMENTS

UNCTAD Series
on issues in international investment agreements



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NOTE

UNCTAD serves as the focal point within the United Nations Secretariat for all matters related to foreign direct investment and transnational corporations. In the past, the Programme on Transnational Corporations was carried out by the United Nations Centre on Transnational Corporations (1975-1992) and the Transnational Corporations and Management Division of the United Nations Department of Economic and Social Development (1992-1993). In 1993, the Programme was transferred to the United Nations Conference on Trade and Development. UNCTAD seeks to further the understanding of the nature of transnational corporations and their contribution to development and to create an enabling environment for international investment and enterprise development. UNCTAD's work is carried out through intergovernmental deliberations, research and analysis, technical assistance activities, seminars, workshops and conferences.

The term "country" as used in this study also refers, as appropriate, to territories or areas; the designations employed and the presentation of the material do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations concerning the legal status of any country, territory, city or area or of its authorities, or concerning the delimitation of its frontiers or boundaries. In addition, the designations of country groups are intended solely for statistical or analytical convenience and do not necessarily express a judgement about the stage of development reached by a particular country or area in the development process.

The following symbols have been used in the tables:

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A slash (/) between dates representing years, e.g. 1994-95, indicates a financial year;

Use of a hyphen (-) between dates representing years, e.g. 1994-1995, signifies the full period involved, including the beginning and end years.

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Annual rates of growth or change, unless otherwise stated, refer to annual compound rates.

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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:

- Admission and establishment
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- Employment
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- Fair and equitable treatment
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- Scope and definition
- Social responsibility
- State contracts
- Taking of property
- Taxation
- Transfer of funds
- Transfer of technology
- Transfer pricing
- Transparency
- Trends in international investment agreements: an overview

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

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