

assess the cost of pollution in monetary terms? Why should the polluter only bear all the pollution abatement costs? Naturally, developing countries will seek many more clarifications before accepting this principle. As observed: "To adopt the principle in its broadest definition would mean disaster for most industries and their nations' economies, or place prices of products well out of the reach of the common man" (See the article by Robert E. Lutz II in the *American Journal of Comparative Law*, Vol. 24, No.3, Summer 1976).

11. *Has your country signed and/or ratified any (i) bilateral, (ii) regional or (iii) international agreement dealing with environmental matters?*

NOTE : By its resolution 3436 (XXX), the General Assembly of the United Nations urged all States to become parties to existing Conventions and Protocols in the field of environment. It also requested the Executive Director of the UNEP to assist, upon request, in preparing proposals for legislative or other measures necessary for their adherence to these Conventions. During the year 1975 at least seven global Conventions have come into force. These are :-

- (i) The Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973;
- (ii) The Convention on Wetlands of International Importance especially as Waterfowl Habitat, 1971;
- (iii) The Convention concerning the Protection of the World Cultural and Natural Heritage, 1972;
- (iv) The International Convention relating to Intervention on the High Seas in cases of Oil Pollution Casualties, 1969;
- (vi) The Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft, 1973; and
- (vii) The Convention for the Prevention of Marine Pollution by Dumping of Wastes and other matter, 1972.

At the regional level, in early 1976, a Conference of Plenipotentiaries of the coastal States of the Mediterranean region signed a Convention and Protocols aimed at preventing further pollution of the Mediterranean Sea. Among the signatories to this Convention (popularly known as the Barcelona Convention), the Asian-African States include: Cyprus, Egypt, Israel, Lebanon, Libyan Arab Republic, Morocco, Syrian Arab Republic, Tunisia and Turkey.

**V. RECIPROCAL ASSISTANCE IN
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RECIPROCAL ASSISTANCE IN REGARD TO PREVENTION AND INVESTIGATION OF ECONOMIC OFFENCES AND PROSECUTION OF OFFENDERS

Introductory

The subject, "Reciprocal Assistance in regard to Prevention and Investigation of Economic Offences and Prosecution of Offenders" was referred for consideration by the Republic of Sri Lanka under Article 3 of the Committee's Statute, at the Kuala Lumpur Session held in June-July 1976. The Committee's work on this subject is intended to cover new types of economic offences, examination of the difficulties experienced in regard to investigation and prosecution of offenders and preparation of a draft convention.

A preliminary study prepared by the Committee's Secretariat served as the basis of discussion on the subject at the Baghdad Session held in February 1977. Following the Baghdad Session, a second study alongwith a questionnaire was prepared by the Secretariat and placed before the Doha Session held in January 1978. The questionnaire was considered and finalised at the Doha Session.*

The questionnaire has been sent to member and several non-member governments and also to certain international organisations engaged in this field.

Several delegations, which expressed their Governments' concern over crimes affecting national economies such as smuggling, foreign exchange violations, illegal outflow of capital, illicit traffic in narcotics, bribery and corruption, referred to the difficulties faced by their governments in dealing with transnational crimes, which span the borders of two or more countries, without the cooperation and assistance of the other country or countries concerned. They favoured the establishment of a machinery to effectively deal

* The Questionnaire is reproduced on page 96.

with such transnational crimes in the detection, investigation, prosecution and punishment of offenders. The participants were of the view that the Secretariat should, upon receipt of an adequate number of replies to the questionnaire, prepare an exhaustive report on the subject in consultation with various governments so that the matter could be further discussed at a Working Group meeting to be convened by the Secretary-General at an appropriate time.

Questionnaire

1. *What are the types of economic offences which in your opinion call for immediate preventive action and control?*

Note: Economic offences are of various types, many of which are primarily of a local character such as violation of price control regulations, offences by commodities, frauds by and against insurance institutions, bribery etc., but some of these crimes involve an international element. Again, some of the economic offences are of a very sophisticated nature prevalent in advanced countries and have not yet been reported in the developing countries. Such crimes include computer crimes, forgery and misuse of cheques and other negotiable instruments.

Any plan to work out a framework for inter-State assistance would obviously depend upon the nature of the offence for which such a framework is sought and the type of offender who commits it. It is, therefore, necessary to identify the offences as well as the offender and for this purpose, it is possible to classify economic offences into two broad categories in terms of the offender, namely (a) offences by individuals and organised groups and (b) offences by companies and transnational corporations. Admittedly, many of the offences such as fraud, illicit payments and corrupt practices, infringement of patents, trademarks and copyrights etc., could be carried out by both. But offences like smuggling, foreign exchange violations and violations of drug control restrictions are mainly carried out by individuals and organi-

sed groups only. Similarly offences, such as cartel offences or unfair labour practices are carried out only by companies and transnational corporations.

The Report of the Working Group I of the UN Committee on Crime Prevention and Control of New and Special Problems of Crime* has singled out corruption as a prevalent phenomenon spreading all over the world, invading the political and economic sectors. It was no longer confined to individuals but in some places had permeated the entire social texture, constituting a threat to democracy and public welfare. Corruption fed on official venality had tended to have a reciprocal relationship with other 'illicit' activities such as organised crime. International and transnational economic criminality also generated and reinforced the corruption of politicians and administrators and this made the task of fighting corruption at the national level even more formidable. According to the Report, far reaching measures for the prevention and control of corruption were required, which would take account of these inter-relationships, including the adverse impact of corruption on national development.

The Report pointed out that the quantitative damage caused by economic crimes resulting from certain types of practices of gangs and organised groups, particularly of multinational corporations, such as transfer of capital, new systems of handling labour, manipulating currency and fiscal laws, transfer prices etc., was greater than that caused by other forms of crime. The Report also pointed out that in developed countries there usually existed some legal safeguards against these kinds of practices, but they were all too often lacking in the developing countries.

On illicit drug traffic and drug abuses, the Report stressed the need for viewing the drug problem in its social dimensions and the importance of developing suitable model legislations for prevention and treatment which would incorporate

* Doc. E/AC. 57/19, Add. 1

principles of drug abuse control along with technical measures. According to the Report it was now realised that international action in this area had to consist of more than the implementation of conventions, particularly in the fluid situation with its changing patterns of drug use (e.g. trend towards poly drug use). Overpenalisation or excessive reliance on the medical model proved counter-productive and integrated multilevel approaches were required.

Violation of foreign exchange regulations and existence of foreign exchange rackets is a prevalent phenomenon in the developing countries whose economies are greatly affected by these offences.

Smuggling is another common type of economic offence carried out by individuals and organised groups, by bringing in or taking out goods without paying the necessary customs duties etc.

2. *Would your Government be in a position to supply data and information regarding the type of economic offences committed in your country, the frequency of such offences committed by foreign nationals if any, and action taken in respect of those which were detected?*

Note: At present there is no adequate machinery for a systematic collection and analysis of information available on transnational crimes. The UN regional institutions for social defence at Cairo and Tokyo have been making efforts towards this direction but the information collected so far is scanty. Such data is essential to study the causes and/or the implications of economic crimes to make practical recommendations and take appropriate steps and outline a scheme for effective international action.

3. *What, in your opinion, ought to be the duty of a State in regard to detection and prevention of acts or omissions within their territory by individuals or groups which are aimed at economic subversion or have adverse effect or detrimental to the economic well-being of other State? What legislative or administrative measures would you suggest as being suitable for adoption by States in this regard?*

Note: It is well known that economic offences which are transnational in character involve acts and omissions on the part of individuals and groups in different countries. For example, in regard to smuggling operations the goods are usually sent out from one country with the object that these should be taken into another country without compliance with import control or customs regulations. Despatch of such goods are often done in an illicit manner but at times in circumstances which do not necessarily involve violation of the laws of the State from which the goods are sent. At times the goods may be routed through a third State in order to make detection more difficult. Under the general principles of international law, a State is under a duty to prevent its territory being used for acts detrimental to other States. This principle is generally applied in regard to political and subversive activities. It is for consideration whether these principles should not be made equally applicable to acts and omissions which constitute threats or have adverse effect on the economic well-being of nations having regard to the phenomenal increase of such activities which at times may paralyse the economy of States. If this principle is applicable, then a State will be under an obligation to detect and prevent such acts being committed from its territory.

4. *Have any legislative or administrative measures been taken in your country to prevent the commission of acts detrimental to other States in the economic field in your territory?*

5. *What legislative or administrative measures have been taken in your country to prevent and/or detect commission of economic offences in your country more particularly in the field of (a) suppression of smuggling activities; (b) violation of foreign exchange regulations in regard to transfer of funds, invoicing of goods, etc; (c) trafficking in drugs; and (d) activities of companies and multinational corporations in regard to manipulation of markets, cartel arrangements, etc.?*

Note: Many of the developing countries are faced with the problem of smuggling and violation of drug control regulations. Smuggling is mainly carried out by bringing in or taking out goods without paying the necessary customs duties or in violation of import or export control regulations. Strict legislative measures have been taken against smugglers in both India and Pakistan. Drug control legislations are in force in Afghanistan, Nepal, Malaysia, Singapore and many other countries. Sri Lanka is taking strict measures to prevent smuggling, trafficking in foreign currency, loading of invoices, hoarding of essential goods, etc. Sri Lanka had also envisaged mandatory terms of imprisonment and establishment of special courts with the authority to even disregard traditional rules of evidence and procedure in certain cases.

6. *Has your country experienced any difficulty in regard to investigation into economic offences perpetrated against your country particularly in regard to violation of the laws and regulations of your country in force? If so, what are the nature and type of difficulties encountered?*

Note: In transnational economic crimes, the *modus operandi* is usually through organised groups involving frequent use of the communication media such as telephone, telegraph and telex, and sometimes even highly sophisticated technology is employed. These factors make detection a formi-

dable task. Furthermore, the absence of any international police force makes investigation and collection of evidence extremely difficult. Again, due to lack of uniformity in the national laws and regulations of various countries, what may be a serious offence in one State may not be an offence at all in the other.

7. *What form of assistance should a State render to another in the matter of investigation into economic offences committed against that State? Would you consider that the investigating authorities should themselves be allowed to conduct their investigations in other States? If so, under what conditions? Or would you prefer that the investigation within a State should be conducted by the authorities of that State at the request of and in co-operation with the investigating authorities of the aggrieved State?*

Note: It is evident that investigation into economic offences which are transnational in character is extremely difficult because the police and investigating agencies of a State cannot have jurisdiction to conduct investigations outside the territories of their State. When various elements of the offence take place in different jurisdictions, investigation can be completed only if material and information available in different countries can be pieced together. For this reason co-operation and mutual assistance in this regard between various countries is essential. One alternative is that the investigating authorities of the affected State should be allowed to carry on the work of investigation in different countries with their consent. This, however, may lead to certain difficulties in regard to local laws. The other alternative is that in each country the investigation will be done by the local authorities at the request of and in co-operation with the investigating authorities of the affected State.

8. *What measures would, in your opinion, be appropriate for recording of evidence from witnesses in other countries and recalling of such witnesses in respect of international economic offences?*

Note : It may be mentioned as an example that the U.S. Department of Justice and the Ministry of Justice of Japan signed an agreement on 23 March 1976, concerning mutual assistance in the investigation and prosecution of alleged illicit acts pertaining to the sales activities in Japan of Lockheed Aircraft Corporation. Article 7 of that agreement contains a reciprocal undertaking for the expeditious execution of letters rogatory issued by the judicial authorities of the United States and of Japan.

On 28 May 1976, the Tokyo District Court requested immediate assistance in the taking of depositions of three former officials of the Lockheed Aircraft Corporation. The Japanese letter rogatory was presented *ex parte* by the U.S. Attorney to the U.S. District Court in Los Angeles.

The witnesses were examined in the District Court by the court appointed commissioners. The court, however, directed that the transcript of the depositions be sealed and not transmitted to the Japanese tribunal pending the receipt by the court of adequate assurances from the Japanese authorities that the witnesses would not be subjected to criminal prosecution in Japan based on the testimony given by them in the United States.

On 24 July 1976, the Supreme Court of Japan, issued a declaration that was presented to the U.S. District Court, following which the District Court released the testimony and directed that the transcript of the testimony be transmitted to the Tokyo District Court.*

9. *To what extent information regarding economic offences may, if any, be withheld on the ground of public policy?*

Note : Problems arise from the provisions of national laws which in certain cases require persons and institutions to observe secrecy, such as in respect of bank accounts of individuals. However, some of these provisions in general

* International Legal Materials (September 1976) Vol. XV, No. 5, pp. 1011-12.

do not apply to cases where a prosecution has been ordered and they could, therefore, easily be made the subject of disclosure on a government to government basis. Again, in respect of matters where secrecy is required as a matter of national law, exceptions to the rule could be made in the interests of international co-operation on a regional or sub-regional basis.

For example, in *United States Vs. Field** a Canadian national and Resident Managing Director of a bank in Grand Cayman Islands was served with subpoena in Miami which directed him to appear as a witness before a federal grand jury which was investigating various business activities in the United States conducted by the bank and related bank in Bahamas. Field refused to answer any questions regarding his bank on the ground that such testimony would violate the bank secrecy laws of the Cayman Islands and make him liable to criminal proceedings there. The District Court held him in civil contempt. On appeal, the Court of Appeals affirmed this decision. According to Morgan, C.J. :-

“.....To the degree that the ability to obtain evidence is crucial to all criminal justice proceedings, the need for broad authority in the grand jury is greatest...To defer to the law of Cayman Islands and refuse to require Mr. Field to testify would significantly restrict the essential means that the grand jury has of evaluating whether to bring an indictment.”

It was shown that in the United Kingdom and in the Cayman Islands information about the business activities of banks could be obtained under certain circumstances. According to the Court of Appeals, therefore, it followed that the United States should not be barred from compelling such disclosure.

* American Journal of International Law (1976) Vol. 70, No. 4, pp. 845-46.