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Asset recovery

Identifying victims of corruption, spontaneous sharing of information and the use of settlements and other alternative mechanisms

Note by the Secretariat

I. Introduction

1. In its resolution 6/2, the Conference of the States Parties to the United Nations Convention against Corruption directed the Open-ended Intergovernmental Working Group on Asset Recovery to:

(a) Initiate the process of identifying best practices for identifying victims of corruption and the parameters for compensation;

(b) Initiate the process of identifying best practices and developing guidelines for the proactive and timely sharing of information to enable States parties to take appropriate action, in accordance with article 56 of the Convention;

(c) Collect information, with the support of the Secretariat, regarding State parties' use of settlements and other alternative mechanisms and analyse the factors that influence the differences between the amounts realized in settlements and other alternative legal mechanisms and the amounts returned to affected States, with a view to considering the feasibility of developing guidelines to facilitate a more coordinated and transparent approach to cooperation among affected States parties and effective return;

(d) Report its findings on each of those matters to the Conference at its subsequent session, with the support of the Secretariat.

2. The present document presents the action taken by the Secretariat on the three matters set out in subparagraphs 1 (a)-(c) above and also presents the relevant discussions and recommendations by the Open-ended Intergovernmental Working Group on Asset Recovery and a suggested way forward for each of them. It also refers to the workplan for future thematic discussions of the Working Group.

* CAC/COSP/2017/1.



II. Identifying best practices for identifying victims of corruption and the parameters for compensation

A. Action taken by the Secretariat

3. The Secretariat prepared a conference room paper ([CAC/COSP/WG.2/2016/CRP.1](#)), entitled “Good practices in identifying the victims of corruption and parameters for their compensation” for the tenth intersessional meeting of the Working Group, held in Vienna on 25 and 26 August 2016. The information contained therein drew primarily on the information collected during the first cycle of the Mechanism for the Review of Implementation of the United Nations Convention against Corruption, which covered chapters III and IV of the Convention, and also included the findings of various relevant tools, in particular those developed by the joint UNODC-World Bank Stolen Asset Recovery (StAR) Initiative. That conference room paper has been issued as document [CAC/COSP/2017/11](#) for the current session of the Conference, and translated into all the official languages of the United Nations.

4. The Secretariat sent to Member States a note verbale on 2 May 2017, inviting them to continue sharing information on good practices in relation to the identification and compensation of victims. As at 31 August 2017, 10 States had responded to that request for information. The responses were generally brief, primarily outlining the existing legal framework for compensation of victims of crime. Almost no information was provided concerning good practices and challenges in the area of victim compensation. The limited number and scope of the responses from States parties confirmed the finding contained in [CAC/COSP/WG.2/2016/CRP.1](#) that, while legal avenues exist for victims to claim compensation, only very few compensation cases concerning victims of corruption have been reported and how the existing legal frameworks operate in practice remains largely unknown.

B. Discussions and recommendations of the Working Group

5. During the discussions at the Working Group’s tenth meeting, several speakers reaffirmed the commitment of their jurisdictions to providing for compensation of and restitution for all victims of corruption. Delegates highlighted improvements to their national legal frameworks and mechanisms that allowed for States, individuals and legal entities to be compensated as victims. Speakers re-emphasized the importance of international cooperation for the purposes of compensating victims of corruption, including by providing effective mutual legal assistance, expediting cases and avoiding unnecessarily cumbersome procedures. One speaker called for advancing international cooperation in civil and administrative proceedings, as well as for full and effective implementation of article 53 (b) of the Convention. In that context, she specifically called upon States parties to ensure that their laws provided legal standing for other countries to claim compensation for damages suffered by local governments or other governmental entities within a State, recalling the provisions of Conference resolution 6/4 in that regard.

6. Accordingly, the Working Group requested the Secretariat to continue its efforts, subject to the availability of resources, to gather information on good practices in relation to the identification and compensation of victims in accordance with Conference resolution 6/2, including through soliciting information from States parties and organizing an expert panel at the Group’s eleventh meeting.

7. A panel discussion on the identification and compensation of victims of corruption was held during the Group’s eleventh meeting. The panel included representatives of both a requesting and requested State who shared their experiences in cases where a State was recognized as a victim of corruption. In their presentations, the panellists described cases from which their jurisdictions had drawn important lessons in victim compensation. The experts stressed, inter alia, certain challenges that needed to be addressed in such cases. They included: (a) the need for cooperation

between the States involved; (b) the need to address the high expectations of external observers regarding ensuring that corruption did not taint the process; (c) the importance of transparency and accountability in both the requested and requesting States; (d) the need for more prompt recovery of public funds; (e) the need for robust legal frameworks, including the use of asset recovery networks to support international cooperation in the recovery efforts; and (f) the use of alternatives to mutual legal assistance, such as direct recovery through civil action.

8. Speakers welcomed the transparent and accountable allocation of returned assets to compensate victims and enhance development in States. They emphasized the need to ensure that returning States were mindful of their obligation regarding the unconditional return of assets, in accordance with the Convention. Speakers further noted the various available avenues and trade-offs relating to recovering assets and compensating victims. They underscored the importance of engaging in a balancing exercise in each case, taking into account the length of proceedings, as well as the consequences to victims and the risk that bribe-payers might not be subject to prosecution in the case of civil proceedings.

9. Several speakers noted that there was no one-size-fits-all approach, including in terms of the identification of victims. One speaker noted that a State may be a victim even in cases involving the culpability of its own officials. Several speakers suggested increased efforts that could be taken by States to ensure the return of assets to victims, such as greater building of trust, information-sharing, inter-agency coordination and use of foreign representation where it assisted in facilitating returns. Speakers noted that they had learned a number of lessons and were improving their approaches to the return of assets, including for victim compensation, such as through the use of clear procedures or guidelines.

10. It is expected that the second review cycle, with its focus on chapter V of the Convention, will generate more knowledge on how States parties implement their obligations. In the context of settlements and other alternative mechanisms, the punitive and retributive nature of relevant fines or disgorgement ought to be further analysed, particularly in the context of the discussion on compensating the victims of corruption offences.

C. Suggested way forward

11. In order to gain further information from States and to share good practices, the Secretariat is organizing a special event during the seventh session of the Conference of the States Parties on the issue of compensation of victims of corruption. The event will consist of various presentations on specific themes and case studies related to victim compensation, with a view to increasing knowledge on how victims of corruption, including foreign States, are compensated in practice.

12. The Conference may wish to encourage States parties to continue their efforts to share cases, procedures and guidelines related to the identification and compensation of victims of corruption.

13. The Conference may wish to recommend the accumulation of knowledge regarding the identification and compensation of victims of corruption.

14. The Conference may wish to discuss further ways to study experiences, in particular specific cases and lessons learned, relating to various practical aspects of victim compensation. It may also wish to encourage States parties to share any existing guidelines or principles in this area that are followed by practitioners in their jurisdictions.

III. Identifying best practices and developing guidelines for the proactive and timely sharing of information

A. Action taken by the Secretariat

15. The Secretariat presented document [CAC/COSP/WG.2/2017/2](#), entitled “Proactive and timely sharing of information, in accordance with article 56 of the Convention”, to the Working Group at its eleventh meeting. The document presented an overview of the current international legal framework and a reflection of the state of knowledge on relevant national legislation and country practice, as well as some examples of cases. The document was based on information provided by States parties in response to a note verbale sent on 2 May 2017,¹ as well as the country reports and executive summaries of 156 States parties that had finalized their country reviews on article 46, paragraph 4, of the Convention, which is closely linked to article 56.

16. Article 56 of the Convention reads as follows: “Without prejudice to its domestic law, each State party shall endeavour to take measures to permit it to forward, without prejudice to its own investigations, prosecutions or judicial proceedings, information on proceeds of offences established in accordance with this Convention to another State party without prior request, when it considers that the disclosure of such information might assist the receiving State party in initiating or carrying out investigations, prosecutions or judicial proceedings or might lead to a request by that State party under this chapter of the Convention”.

17. Apart from the Convention, spontaneous transmission of information is addressed in a number of global and regional treaties (article 18, paragraphs 4 and 5, of the United Nations Convention against Transnational Organized Crime; the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters; article 20 of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism; the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders; article 29 of the Arab Anti-Corruption Convention; article 4, paragraph 1, of the Agreement on Cooperation among Member States of the Commonwealth of Independent States in Combating Crime; and article 8 of the Convention of the Portuguese-Speaking Community on Mutual Legal Assistance). In the context of the review of the implementation of article 46, paragraph 4, many countries referred to those regional treaties, as well as to bilateral treaties, agreements, arrangements or memorandums of understanding that contained provisions on spontaneous disclosure.

18. Generally, spontaneous disclosure does not require a treaty basis. As in other mutual legal assistance matters, nearly all countries can spontaneously disclose information in the absence of a treaty, operating on the basis of reciprocity, or case-by-case arrangements. However, there are a few countries that require a treaty basis or foresee that the spontaneous transmission of information without a treaty basis requires specific authorization. A number of States indicated that they could use the Convention as a legal basis for spontaneous disclosure. Although treaties and arrangements are not necessary for most countries, they can facilitate and promote the spontaneous disclosure of information by providing legal clarity about the permissibility and legitimacy of such information-sharing and have been recommended as a policy measure to strengthen spontaneous disclosure.²

¹ As at the date of reporting, 17 replies had been received, most of which were published on the web page of the eleventh meeting of the Working Group (www.unodc.org/unodc/en/corruption/WG-AssetRecovery/session11.html).

² Kevin M. Stephenson and others, *Barriers to Asset Recovery: An Analysis of the Key Barriers and Recommendations for Action* (Washington, D.C., World Bank, 2011), p. 22.

19. With regard to national legislation, approximately 20 per cent of the 154 countries³ that have finalized their reviews on article 46, paragraph 4, have enacted specific legislation on spontaneous disclosure. The majority of countries introduced those provisions into their general laws, such as mutual legal assistance laws or criminal procedure codes. The countries that have done so include in particular a number of countries from the Group of Western European and other States and the Group of Eastern European States, but also two from the Group of African States. Two countries from the Group of African States have included provisions on spontaneous disclosure of information in their anti-corruption laws, and some countries from all of the regional groups have included such provisions in the laws against money-laundering. The great majority of countries do not have legislation on spontaneous disclosure. However, that was only considered an obstacle to spontaneous disclosure in one country, which was in the process of addressing the issue in draft legislation. A number of countries considered that, even if not explicitly allowed, spontaneous transmission is possible to the extent that it is not prohibited. Although legislation is not considered a requirement for spontaneous disclosure in most countries, a number of country reports contained recommendations to enact such legislation. Some policy documents include recommendations to enact specific legislation.⁴

20. Those countries with legislation in place foresee different requirements and conditions for the spontaneous sharing of information. Some only include conditions contained in article 46 of the Convention, such as the speciality principle (the information may not be used for other purposes than the one giving rise to the submission or the law governing the submission), general confidentiality requirements or the condition that information is shared “without prejudice to its own investigations, prosecutions or judicial proceedings”. However, other national laws contain very strict requirements, for example, data protection and deletion requirements that go beyond confidentiality requirements, minimum penalty requirements (up to five years of imprisonment) or requirements that the information relates to offences of a certain gravity, for example, those qualifying for extradition. Some countries also require a treaty basis or have strict procedural requirements, for example, a decision at the ministerial level.

21. With regard to the transmitting institution, States parties generally permit the competent authorities from which the information originates to spontaneously transmit it abroad. However, a few countries have designated one specific authority to transmit the information generated by all competent authorities. Often, the information originates in financial intelligence units, but it could also originate in any law enforcement or judicial authority involved in the investigation or adjudication of corruption cases. The spontaneous transmission of information requires a high level of trust and confidence in the receiving counterparts. Therefore, law enforcement networks and secure platforms, as well as informal channels of communication, officials posted in overseas missions and appointed liaison officers, play an essential role.

22. With regard to the role of receiving jurisdictions, active follow-up is an important requirement for the success of spontaneous disclosure. In order to allow for successful follow-up to the information received, it has been recommended that recipients of spontaneously disclosed information should contact the authority of origin to find out about the foreign case, ensure that assets remain frozen and discuss the next steps to be taken. Further, it is important that the receiving country open an investigation, in the course of which it prepares a mutual legal assistance request to formalize the transmission of information and complement the information received. In many cases, a request for (continued) freezing or seizure of assets would also be permissible.⁵

³ As at the time of reporting.

⁴ Stephenson and others, *Barriers to Asset Recovery*, p. 6.

⁵ Jean-Pierre Brun and others, *Asset Recovery Handbook: A Guide for Practitioners* (Washington, D.C., World Bank, 2011), p. 137; and Larissa Gray and others, *Few and Far: The Hard Facts on Stolen Asset Recovery* (Washington, D.C., World Bank, 2014), p. 3.

23. Spontaneous disclosures with regard to administrative freezes are an important special case. Administrative freezes were adopted and implemented widely for the first time in the context of the Arab Spring. Canada, Switzerland, the United States of America and countries of the European Union took measures to administratively freeze assets between 2010 and June 2012. One of the barriers that hindered progress in those asset recovery cases was that the requesting jurisdictions indicated that they were unaware of the freezing orders and the location and amount of frozen assets. Therefore, the jurisdictions that had administratively frozen assets used spontaneous disclosures to provide information on such assets. Others went even further and provided capacity-building to practitioners in foreign jurisdictions for following up on such measures, for example, through the placement of regional advisers.⁶

24. Another important special case is the spontaneous disclosure of information on ongoing or concluded settlements to resolve foreign bribery cases. A recent study by the StAR Initiative⁷ contained a number of recommendations, including that jurisdictions pursuing settlements should spontaneously inform affected jurisdictions that a negotiation toward a settlement was taking place, and should proactively share information on concluded settlements with other potentially affected countries. Countries whose officials were allegedly bribed should step up their own efforts to mount effective investigations and prosecutions against bribe-givers and takers (for further detail on settlements, see section IV below).

B. Discussions and recommendations of the Working Group

25. During the eleventh meeting of the Working Group, a panel discussion on the proactive and timely sharing of information was held. The panellist from Switzerland informed the Group that Swiss legislation foresaw spontaneous transmission of information at three levels: the judicial level, the financial intelligence unit level and the administrative level (the latter of which was governed by relatively recent legislation). The panellist from Belgium presented the case regarding the assets of Mr. Ben Ali, former President of Tunisia, from the perspective of Belgium. Although domestic legislation had not been enacted to support the implementation of Council of the European Union decision 2011/72/CFSP of 31 January 2011 concerning restrictive measures directed against certain persons and entities in view of the situation in Tunisia, Belgium swiftly froze and seized relevant assets, set up a system for proactive information exchange and established direct contact with Tunisia to assist with its mutual legal assistance request. The panellist from the Egmont Group informed participants about the role of the Group in spontaneous information-sharing. As a body of financial intelligence units, the Egmont Group was established in 1995 and had 156 members who exchanged information freely, spontaneously and upon request, on the basis of reciprocity. The Group provided a secure information-sharing platform, the Egmont Secure Web, which member institutions could use to share information. The speaker highlighted the importance of the capacity and equipment of financial intelligence units for efficient information-sharing.

26. Speakers reported on their countries' experience with regard to spontaneous information-sharing. They referred to their countries' specific legislation or explained that their institutions shared information without legislation, on the basis of established practice, the Convention or relevant regional treaties. One speaker informed the Working Group about the assistance provided by the StAR Initiative to his country in accessing global and regional networks such as the Global Focal Point Initiative, supported by the International Criminal Police Organization (INTERPOL) and the StAR Initiative, Eurojust and the Egmont Group. He also made reference to the Arab Forum on Asset Recovery. He highlighted that spontaneous disclosure, as

⁶ Gray and others, *Few and Far*, p. 42.

⁷ Jacinta Anyango Oduor and others, *Left out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery* (Washington, D.C., World Bank, 2014).

well as asset recovery in general, depended on the political commitment of requested States and the availability of technical capacity for swift information-sharing.

27. As a conclusion, the Working Group recommended that the Secretariat, in consultation with the Group, should continue its efforts to identify best practices and develop guidelines for the proactive and timely sharing of information. Further to the points for discussion proposed in document [CAC/COSP/WG.2/2017/2](#), it could be discussed how focal points for information exchange from the various networks could be brought together and communication and coordination between various networks could be improved. The Working Group re-emphasized the need for States parties to make information on settlements and other alternative mechanisms available, including, where appropriate, through public means.

C. Suggested way forward

28. Following the recommendation of the Working Group, the Secretariat, in consultation with the Working Group, will continue its efforts to identify best practices and develop guidelines for the proactive and timely sharing of information. Together with the areas for discussion recommended by the Group (mentioned in paragraph 29 above), the following points for discussion, first proposed in document [CAC/COSP/WG.2/2017/2](#), will serve as the starting point:

(a) With regard to the treaty basis of spontaneous information-sharing, it could be a good practice:

- (i) To spontaneously transmit information without the need for a treaty basis;
- (ii) To spontaneously transmit information without the need for an assurance of reciprocity, for example on the basis of existing general information-sharing arrangements or networks, or on a case-by-case basis;
- (iii) To include spontaneous sharing of information in new bilateral and regional treaties on mutual legal assistance;

(iv) To conclude new information-sharing arrangements;

(b) It could be discussed whether it is a good practice:

- (i) To enact legislation on spontaneous disclosure;
- (ii) To enact such legislation in general laws or in other types of laws;
- (iii) To specify specific conditions, avenues and types of information and to which level of detail such topics should be regulated;

(c) It could be further discussed which requirements should, as a best practice, be avoided in such legislation in order to ensure a swift flow of information;

(d) The types of institutions that should ideally be granted the right to make spontaneous disclosures could be a further area for discussion. In particular, it could be considered whether the designation of a specific authorized authority is a good practice, or whether it is better to grant authorization to all relevant institutions that generate relevant information;

(e) Good practices to be discussed for the receiving country could include:

- (i) Entering into contact with the transmitting jurisdiction for informal discussions on further steps;
- (ii) Opening an investigation if it has not yet done so and if the elements are sufficient under its domestic law;
- (iii) Preparing mutual legal assistance requests to complement the information and requests for (continued) seizure or freezing orders;

(f) With regard to administrative freezing, it could be considered whether the following are good practices:

(i) Spontaneously sharing information with the country of origin on administratively frozen assets, as soon as the political situation permits it;

(ii) Providing, if appropriate, assistance in the ensuing mutual legal assistance procedures;

(g) In settlement cases, the following could be included as good practices:

(i) For countries pursuing settlements to spontaneously transmit information to other affected countries on the basic facts of the case;

(ii) Proactively sharing information on concluded settlements with other potentially affected countries;

(h) How focal points for information exchange from the various networks could be brought together and how communication and coordination between various networks could be improved.

29. The Conference may wish to provide guidance on the methodology that should be adopted for the continued efforts of the Secretariat to develop best practices and guidelines on the proactive and timely sharing of information.

IV. Considering the feasibility of developing guidelines regarding States parties' use of settlements and other alternative mechanisms

A. Action taken by the Secretariat

30. In line with resolution 6/2 the Secretariat prepared a note entitled "Settlements and other alternative mechanisms in transnational bribery cases and their implications for the recovery and return of stolen assets" for consideration by the Working Group at its tenth meeting ([CAC/COSP/WG.2/2016/2](#)). The note built on the conclusions of the study undertaken by the StAR Initiative entitled *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery* and contained an analysis of additional data on settlements that had been concluded between mid-2012 and the end of April 2016 with a view to determining whether: (a) the trend of using settlements and other alternative mechanisms had developed in any significant way since mid-2012; (b) the differences between the amounts realized in such settlements and other alternative mechanisms and the amounts returned to affected countries remained; and (c) affected countries and other victims had been involved more frequently in the conclusion of settlements and other alternative mechanisms since mid-2012.

31. Additionally, in line with resolution 6/2 and the recommendations issued by the Working Group following the completion of its tenth meeting, on 2 May 2017 the Secretariat circulated a note verbale to all States parties and signatories requesting them to provide information on the use of settlements and other alternative mechanisms. An oral update regarding the information received was presented to the Working Group at its eleventh meeting. As at 4 September 2017, few States had provided comprehensive information on the subject and no substantive data had been provided that could significantly alter the observations contained in document [CAC/COSP/WG.2/2016/2](#).

32. While the Secretariat will continue to analyse the information received from Member States on the subject, the summary of the observations contained in [CAC/COSP/WG.2/2016/2](#) is presented below.

Defining the term “settlement”

33. Different jurisdictions conduct settlement procedures in different ways. Common-law jurisdictions tend to prefer a negotiated process in which the two sides (prosecution and defendant) reach a mutually acceptable agreement. The agreement, usually a guilty plea, is then presented to a judge for confirmation. However, other forms have also developed. These include civil settlements in the United Kingdom of Great Britain and Northern Ireland, deferred and non-prosecution agreements in the United States and out-of-court restitution agreements in Nigeria.

34. In civil-law countries, although negotiations may take place, the process tends to take the form of a proposal made by the prosecutor to the defendant to admit liability and agree to pay a specific sum of money or meet certain conditions in order to avoid a long, drawn-out procedure.

35. Herein, the term “settlement” has a broad definition, meaning any procedure short of a full trial. It is not intended as a legal definition.

Recent developments in the use of settlements

36. Settlements and other alternative mechanisms continue to be adopted by an increasingly diverse set of developing and developed countries, with both civil- and common-law legal traditions.

37. A significant development among common-law jurisdictions is the introduction, in the United Kingdom in 2014, of the deferred prosecution agreement. Through deferred prosecution agreements, corporations can compensate for harm caused by their criminal conduct, but avoid the serious negative consequences that would usually follow a criminal conviction, such as sanctions and irreparable damage to their public image.⁸ In the United Kingdom, a deferred prosecution agreement is concluded between a prosecutor and a company (not individuals), under the supervision of and subject to the approval of a judge. It allows for prosecution to be suspended for a specified period of time as long as the company meets the conditions contained in the agreement.

38. In the United States, settlements in criminal foreign bribery cases continue to be through plea agreements, deferred prosecution agreements and non-prosecution agreements, although the United States Securities and Exchange Commission generally employs an injunction or cease-and-desist order in its settlements. However, in 2013, the Commission reached its first non-prosecution agreement in a Foreign Corrupt Practices Act case, involving the Ralph Lauren Corporation, and, in February 2016, the agency concluded its first deferred prosecution agreement with an individual defendant in the Parametric Technology case.⁹

39. The overall number of settlements in foreign bribery and other cases declined between 2012 and 2015. However, it should be noted that, since nearly three quarters of the settlements were concluded by United States authorities, the figure primarily reflected a declining use of settlements in foreign bribery cases in the United States.

⁸ Further information is available on the website of the Serious Fraud Office of the United Kingdom (www.sfo.gov.uk). See also Sentencing Council, *Fraud, bribery and money laundering offences*, Definitive Guideline (London, 2014).

⁹ United States Securities and Exchange Commission, “Non-prosecution agreement”, 18 April 2013 (available at www.sec.gov/news/press/2013/2013-65-npa.pdf); and *ibid.*, “SEC announces non-prosecution agreement with Ralph Lauren Corporation involving FCPA misconduct”, 22 April 2013 (available at www.sec.gov/news/press-release/2013-2013-65htm). In the Parametric Technology case, the Securities and Exchange Commission deferred prosecution agreement noted that the defendant was eligible for a deferred prosecution agreement as he had certified that he had “never been charged or found guilty of violating the federal securities laws, or been a party to a civil action or administrative proceeding concerning allegations or findings of violations of the federal securities laws”. The deferred prosecution agreement of 18 November 2015, and other information on the case is available from the StAR Initiative Corruption Cases Database (<http://star.worldbank.org/corruption-cases/node/20443>).

At the same time, two jurisdictions started to use settlements to sanction foreign bribery cases.¹⁰

40. There are also recent examples of countries affected by settlements undertaking large and highly publicized criminal investigations and prosecutions. However, overall, the public availability of information regarding such investigations and prosecutions is limited.

Volume of monetary sanctions imposed as part of settlements

41. During the period 1999 to mid-2012, monetary sanctions totalling \$6.9 billion were imposed.

42. During the period mid-2012 to the end of April 2016, slightly more than \$3.98 billion in monetary sanctions were imposed.¹¹

43. While the overall number of settlements concluded during the period mid-2012 to the end of April 2016 declined, in general, the sanctions imposed as part of individual settlements increased.

Types of monetary sanctions imposed as part of settlements

44. The following types of monetary sanctions typically seem to form the composite elements of settlements in different jurisdictions:

(a) “Confiscation” (also known as “forfeiture”), which is the permanent deprivation of assets by order of a court or other competent authority to the State. It can be conviction-based, non-conviction-based or administrative;

(b) “Disgorgement”, which is a civil remedy in common-law jurisdictions. Similar to confiscation, disgorgement is the forced surrender of illegally obtained profits;

(c) “Fines”, which are monetary sanctions payable to the State that are meant to punish the wrongdoer;

(d) “Restitution”, which is an order to a guilty party to restore a loss to a harmed party as closely as possible to the circumstance before the damage took place. Restitution can be either civil or criminal;

(e) “Compensation”, which is similar to restitution, in that a court may issue a compensation order in a criminal case where a victim has been identified and proved the damage suffered;

(f) “Reparations”, which, for the purposes of document [CAC/COSP/WG.2/2016/2](#), means gratuitous or voluntary payments made by a wrongdoer to atone for harm caused.¹²

45. Monetary sanctions imposed for the purpose of depriving the alleged offender of illicitly acquired proceeds — such as criminal confiscations, civil disgorgement of profits and related pre-judgment interest — constituted approximately \$4.35 billion, or 40.1 per cent of all monetary sanctions imposed, for the entire period 1999 to the end of April 2016.¹³

Assets returned and ordered to be returned

46. *Left Out of the Bargain* contains information on 395 settlement cases that took place between 1999 and mid-2012. Those cases resulted in a total of \$6.9 billion in monetary sanctions. Approximately \$5.9 billion of that amount were monetary

¹⁰ [CAC/COSP/WG.2/2016/2](#), figure I and table 1.

¹¹ *Ibid.*, para. 21 and figure II.

¹² Anyango Oduor and others, *Left Out of the Bargain*, figure B4.1.1.

¹³ [CAC/COSP/WG.2/2016/2](#), figures III and IV, contain a detailed breakdown of the amounts of monetary sanctions by type during the periods 1999 to mid-2012 and mid-2012 to the end of April 2016.

sanctions imposed by a country other than the one whose public official had allegedly been bribed. Of that \$5.9 billion, only about \$197 million, or 3.3 per cent, was returned or ordered to be returned to the countries whose officials were allegedly bribed.¹⁴

47. During the period mid-2012 and the end of April 2016, monetary sanctions totalling \$3,980,789,700 were imposed. Nearly all (\$3,980,652,375) were monetary sanctions imposed by a country other than the one whose public official had allegedly been bribed. Of that amount, only \$7,046,197 (0.18 per cent) was returned to the country whose officials had allegedly been bribed. That amount was one settlement — concluded by the Serious Fraud Office of the United Kingdom in the Standard Bank case — and involved compensation for the affected jurisdiction (United Republic of Tanzania) totalling \$6 million in compensation and \$1 million in interest.¹⁵

48. In addition, between 1999 and mid-2012, approximately \$556 million was returned or ordered returned in cases where the jurisdiction of enforcement and the jurisdiction of the allegedly bribed foreign public officials were the same.¹⁶ In the period mid-2012 to the end of April 2016, the corresponding amount was \$137,325.¹⁷

Transparency of settlement agreements and negotiations

49. The websites of the Department of Justice and the Securities and Exchange Commission of the United States contain comprehensive information on settlement agreements (plea agreements, deferred prosecution agreements and non-prosecution agreements).

50. In the Netherlands, the Public Prosecution Service has pursued enforcement actions very actively in recent years. Links to the relevant information are provided on its website.¹⁸

51. In the past, the United Kingdom Serious Fraud Office did not provide a separate section devoted to foreign bribery cases, but in recent years it has begun to provide case information on its website. Unlike in the United States, where — for a low fee — the public can access an electronic database of all federal court cases, documents filed therein and notations on hearings and motions and other events,¹⁹ only limited court records and judgments relating to the United Kingdom are available online.

52. The degree of availability and accessibility of official case documents varies in other jurisdictions. For example, Switzerland has published media statements with regard to settlements involving legal entities, but not those involving individuals.

53. Germany has provided data to the Organization for Economic Cooperation and Development Working Group on Bribery, and while court proceedings of individual defendants are open to the public, the case records are not.

International cooperation, spontaneous information-sharing and coordinated and joint investigations

54. During the period mid-2012 to the end of April 2016, there was only one instance detected where spontaneous information-sharing led to the successful return of proceeds through a settlement procedure to an affected country. Information was proactively shared by the United Kingdom with authorities in the United

¹⁴ Anyango Oduor and others, *Left Out of the Bargain*, p. 2 and table 4.2.

¹⁵ United Kingdom, Serious Fraud Office, “SFO agrees first UK DPA with Standard Bank”, 30 November 2015. Available at www.sfo.gov.uk.

¹⁶ Anyango Oduor and others, *Left Out of the Bargain*, p. 9 and table 4.1. Other asset returns, in the form of a tax settlement and creation of a special fund to support integrity projects, amounted to \$353.4 million (*ibid.*, table 4.3).

¹⁷ [CAC/COSP/WG.2/2016/2](http://www.cac/cosp/wg.2/2016/2), para. 34.

¹⁸ www.om.nl/algemeen/english.

¹⁹ www.pacer.gov.

Republic of Tanzania and the United States, a measure that was positively noted and commended by the judge presiding over the relevant legal proceedings.²⁰

55. The settlements in the VimpelCom Limited case, involving the Netherlands and the United States, were examples of extensive international cooperation in the enforcement in the context of a foreign bribery case.²¹ The jurisdictions involved — namely, the Netherlands and the United States — extended beyond the enforcement actions against the involved companies.

56. Multi-jurisdictional cooperation was also seen in the Petrobras-related cases. According to the Office of the Attorney-General of Switzerland, in March 2016, authorities in Switzerland and Brazil discussed the issue of creating a joint investigation team aimed at speeding up the proceedings being conducted by the two prosecution authorities.

57. While the above examples suggest an increased level of cooperation, including in cases that may lead to settlements, it remains unclear how or whether spontaneous transmission of information to other affected countries is systematically taking place, unless information thereon is published at the time of the resolution of a case.

Conclusions

58. Settlements and other alternative mechanisms continued to constitute an important tool for an increasingly diverse group of developing and developed jurisdictions of both civil- and common-law traditions in resolving cases of foreign bribery and related offences.

59. A significant gap remains between the amounts realized through settlements and other alternative mechanisms and those returned to the countries whose public officials were allegedly bribed. In the period covered by the present note (from mid-2012 to the end of April 2016), out of approximately \$3.98 billion in monetary sanctions imposed, only \$7 million (or 0.18 per cent) were returned to the country whose officials had allegedly been bribed, as compared with \$197 million (or 3.3 per cent) returned out of \$5.9 billion monetary sanctions imposed between 1999 and mid-2012.

60. While there are recent examples demonstrating the commitment of individual jurisdictions to involving affected countries and other victims in settlements, these examples do not suggest that, overall, the jurisdictions whose public officials were allegedly bribed are more frequently informed, consulted or in any other way involved in the conclusion of settlements than previously.

61. While the findings presented in *Left Out of the Bargain* appear to remain largely relevant, overall, it remains difficult to make an accurate assessment of the use of settlements in many jurisdictions, especially in the case of developing countries. A conclusive assessment of the use of settlements and other alternative mechanisms in concluding transnational corruption cases would require more in-depth and comprehensive analysis.

B. Discussions and recommendations of the Working Group

62. The Secretariat organized a panel discussion during the tenth meeting of the Working Group specifically focused on States parties' use of settlements and other alternative mechanisms. A case of a settlement in a transnational bribery case (the

²⁰ United Kingdom, Royal Courts of Justice, *Serious Fraud Office v. Standard Bank Plc*, Case No. U20150854, Approved Judgment, 30 November 2015.

²¹ The case is also an example of an enforcement action requiring extensive domestic cooperation among relevant agencies. In the United States, cooperation was undertaken by the Department of Justice, the Immigration and Customs Enforcement of the Department of Homeland Security, and the Securities and Exchange Commission. Other cases have required the involvement of the Internal Revenue Service and its Criminal Investigation Division.

Standard Bank case) that led to the return of assets from the United Kingdom to the United Republic of Tanzania was discussed.

63. Speakers highlighted the importance of the proactive sharing of information at all stages leading up to the conclusion of settlements. A number of speakers expressed concern regarding the lack of involvement of requesting and affected States in settlement proceedings and the disposal of assets. Several speakers expressed their concern with regard to an apparent trend of imposing conditions on the return of assets that were the proceeds of illicit acts, including assurances of the legitimate use of such assets by the requesting State in the future.

64. The Working Group recommended that States parties make information on settlements and other alternative mechanisms available, including, where appropriate, through publicly accessible means.

65. The Working Group recommended that States parties, as appropriate, make information available on their legal frameworks and procedures regarding asset recovery, as well as on how they distinguished between the various forms of monetary sanctions that might be imposed as part of settlements and other alternative mechanisms.

66. The Working Group encouraged States to provide to the Secretariat information on their legal frameworks and practices relevant to the use of settlements and other alternative mechanisms in concluding transnational corruption cases, in accordance with Conference resolutions 6/2 and 6/3, with a view to contributing to an informed discussion on considering the feasibility of developing guidelines to facilitate a more coordinated and transparent approach for cooperation among requested and requesting States parties and effective return.

C. Suggested way forward

67. The Conference may wish to consider requesting States parties to continue providing to the Secretariat information on their legal frameworks and procedures relevant to the use of settlements and other alternative mechanisms in concluding transnational corruption cases, in accordance with Conference resolutions 6/2 and 6/3, as well as on how States distinguish between the various forms of monetary sanctions that might be imposed as part of settlements and other alternative mechanisms. The information could be provided in a structured way, for example, through a comprehensive questionnaire prepared with the support of the Secretariat and containing detailed guidelines aimed at facilitating the process of preparation of such information by States parties. The information obtained through such a process could also be used as a basis for an informed discussion on considering the feasibility of developing guidelines to facilitate a more coordinated and transparent approach for cooperation among requested and requesting States parties and effective return.

68. The Conference may also wish to invite States parties, as appropriate, to make information on the conclusion of individual settlements and other alternative mechanisms publicly available.

69. The Conference may further wish to consider cooperating more closely with other international forums with a view to enhancing understanding of the use of settlements in transnational corruption cases and its implications for asset recovery.

V. Further thematic discussions of the Working Group

70. In preparation for the second cycle of the Implementation Review Mechanism, the Working Group established a workplan for the period 2012-2015, which contained

standing agenda items and specific topics for the thematic discussion at each of its meetings.²²

71. After the completion of the workplan, the Working Group maintained the structure of standing agenda items and thematic discussions. It followed the mandate given by the Conference of the States Parties in its resolution 6/2, leading a thematic discussion on each of the three topics selected by the Conference for further deliberations.

72. Prior to the eighth session of the Conference, the Working Group will hold two intersessional meetings, to be held on 6 and 7 June 2018 and on 29 and 30 May 2019.

73. The Conference may wish to provide guidance on future topics of the Working Group's thematic discussions.

²² [CAC/COSP/WG.2/2012/4](#), para. 20.