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Asset recovery

Alternative legal mechanisms and non-trial resolutions, including settlements, that have proceeds of crime for confiscation and return

Note by the Secretariat

Summary

The present document has been prepared pursuant to resolution 8/9 of the Conference of the States Parties to the United Nations Convention against Corruption, entitled “Strengthening asset recovery to support the 2030 Agenda for Sustainable Development”. It provides an overview of the use of alternative legal mechanisms and non-trial resolutions, including settlements, that involve proceeds of crime for confiscation and return.

* CAC/COSP/2021/1.



I. Introduction

1. In its resolution 8/9, entitled “Strengthening asset recovery to support the 2030 Agenda for Sustainable Development”, the Conference of the States Parties to the United Nations Convention against Corruption requested the secretariat, and invited the Stolen Asset Recovery (StAR) Initiative, to continue to maintain and update the Asset Recovery Watch database, particularly in relation to alternative legal mechanisms and non-trial resolutions, including settlements, that have proceeds of crime for confiscation and return, in accordance with the Convention. It also requested the secretariat and invited the StAR Initiative to provide regular updates to the Open-ended Intergovernmental Working Group on Asset Recovery and to study how the use of alternative legal mechanisms and non-trial resolutions, including settlements, that have proceeds of crime for confiscation and return, in accordance with the Convention, taking into account relevant existing information provided, could further promote the effective application of chapter V of the Convention.

2. In the same resolution, the Conference directed the Working Group to continue to collect information, with the support of the secretariat, regarding the use by States parties of alternative legal mechanisms and non-trial resolutions, including settlements, that have proceeds of crime for confiscation and return, in accordance with the Convention and domestic law, and analyse the factors that influence the differences between the amounts realized in alternative legal mechanisms and non-trial resolutions, including settlements that have proceeds of crime for confiscation and return, in accordance with the Convention and domestic law 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 for cooperation among affected States parties, and to report its findings to the Conference at its next session, with the support of the secretariat.

3. In the political declaration adopted by the General Assembly at its special session against corruption held in June 2021, it is emphasized in paragraph 50 that, when employing alternative legal mechanisms and non-trial resolutions, including settlements, in corruption proceedings that have proceeds of crime for confiscation and return, Member States should strengthen their efforts to confiscate and return such assets in accordance with the Convention.

4. The present document has been prepared pursuant to the mandates contained in Conference resolution 8/9, and by using the same research methodology as was used for the preparation of the StAR Initiative study *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, and a note prepared by the Secretariat pursuant to Conference resolutions 6/2 and 6/3 ([CAC/COSP/WG.2/2016/2](#)), but with a focus on the proceeds of crime for confiscation and return.

II. Methodology and data collection

5. Since the 2013 study *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery* and the companion case database of the StAR Initiative, global understanding of and interest in settlements have continued to grow. The aim of that study, which broadly defined settlements to include any form of resolution short of a full trial,¹ was to examine the impact of the increased use of settlements in foreign bribery cases on the implementation of the United Nations Convention against Corruption. For that purpose, settlement cases between 1999 and mid-2012 were analysed.

6. It was observed in the study that, while the Convention did not explicitly deal with settlements, chapter 5 of the Convention established the recovery and return of assets to prior legitimate owners and those harmed as a fundamental principle. In this

¹ For the definition of settlement, see [CAC/COSP/WG.2/2016/2](#), paras. 6–8.

regard, the study's key finding that less than 3 per cent of the monetary sanctions imposed by enforcement countries had been returned to affected countries had raised concerns over whether settlements in practice hinder the effective application of the Convention.

7. As reflected in the note prepared by the Secretariat pursuant to Conference resolutions 6/2 and 6/3 (CAC/COSP/WG.2/2016/2), it was further found that asset returns continued to lag, with less than 1 per cent of the monetary sanctions imposed by enforcement countries being returned to affected countries.

8. In line with Conference resolution 8/9, a note verbale was circulated by the secretariat in February 2021 with a request to provide information regarding the use by States parties of alternative legal mechanisms and non-trial resolutions, including settlements, that have proceeds of crime for confiscation and return; the note verbale also included a questionnaire.²

9. Thirty-two States parties provided responses to that request. Twenty-four States parties responded by stating that settlement mechanisms existed in their countries, ranging from the traditional guilty plea used by common law jurisdictions to more recently adopted mechanisms such as the *acordo de leniência* (leniency agreement) of Brazil, the judicial public interest agreement of France and the "alternative procedures for the resolution of disputes" of Panama. These mechanisms can provide a legal basis for the freezing and/or seizure, confiscation and return of assets in 23 States parties.

10. A summary of the responses was made available for the attention of the Working Group.³

11. The information provided by the States has been incorporated into the database on alternative legal mechanisms and non-trial resolutions, including settlements, that have proceeds of crime for confiscation and return, which was also updated, pursuant to the Conference's mandate, with information from publicly available official sources, and served as a basis for a conference room paper that was considered as background to a thematic discussion at the fifteenth meeting of the Open-ended Intergovernmental Working Group on Asset Recovery, held in September 2021 (CAC/COSP/WG.2/2021/CRP.1).

12. The thematic discussion organized by the secretariat on this topic, in addition to conference room paper CAC/COSP/WG.2/2021/CRP.1, served as a basis for the present document.

III. Trends in the use of settlements

13. Figure I below clearly illustrates the use of settlements to resolve foreign bribery and related cases.⁴ *Left Out of the Bargain* had identified 395 settlement cases between 1999 and mid-2012. The updated database identified 1,468 cases, covering the period from 1999 to May 2021. Of those, 1,242 (84.6 per cent) were resolved through settlements.⁵

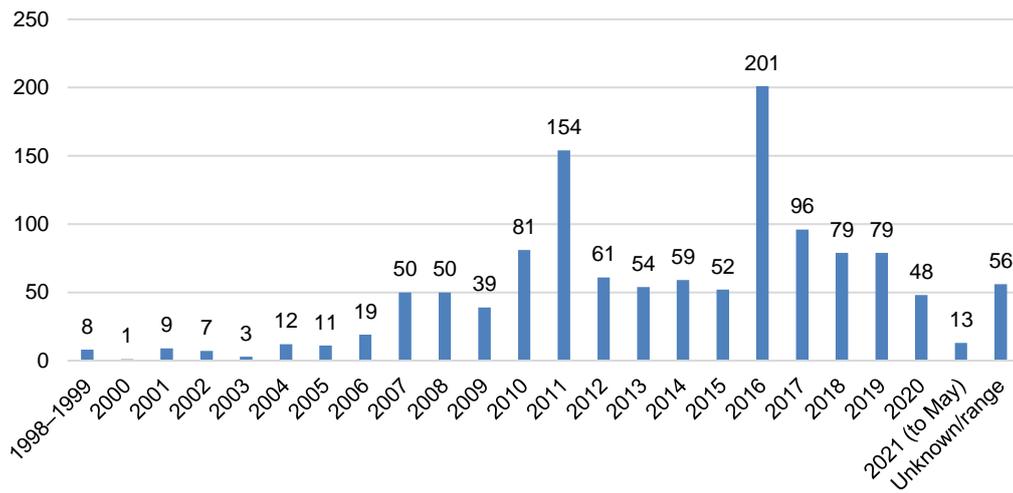
² The following Member States responded to the questionnaire: Afghanistan, Brazil, Bulgaria, Burkina Faso, Canada, Croatia, Cuba, Cyprus, Ecuador, Equatorial Guinea, France, Georgia, Iraq, Kazakhstan, Latvia, Lithuania, Mauritius, Mexico, Morocco, Myanmar, Netherlands, New Zealand, Oman, Panama, Poland, Republic of Moldova, Russian Federation, Saudi Arabia, Slovakia, Slovenia, Switzerland and United Kingdom of Great Britain and Northern Ireland.

³ Available at www.unodc.org/unodc/en/corruption/WG-AssetRecovery/session15.html.

⁴ The 2011 figure reflects the high number of cases reported by Germany in that year. The 2016 figure reflects, in part, the high number of cases reported by Brazil as part of Operação Lava Jato (Operation Car Wash) investigations.

⁵ The database prepared for *Left Out of the Bargain* did not include non-settlement cases. The 1,468 cases in the current database include ongoing and concluded cases. The tally of settlement cases does not include ongoing cases, with the exception of three Department of Justice cases in the United States of America in which the individual defendants had pleaded guilty and were awaiting sentencing as of the end of May 2021. Of the remaining cases, 97 were ongoing and, in

Figure I
Number of settlement cases, by year

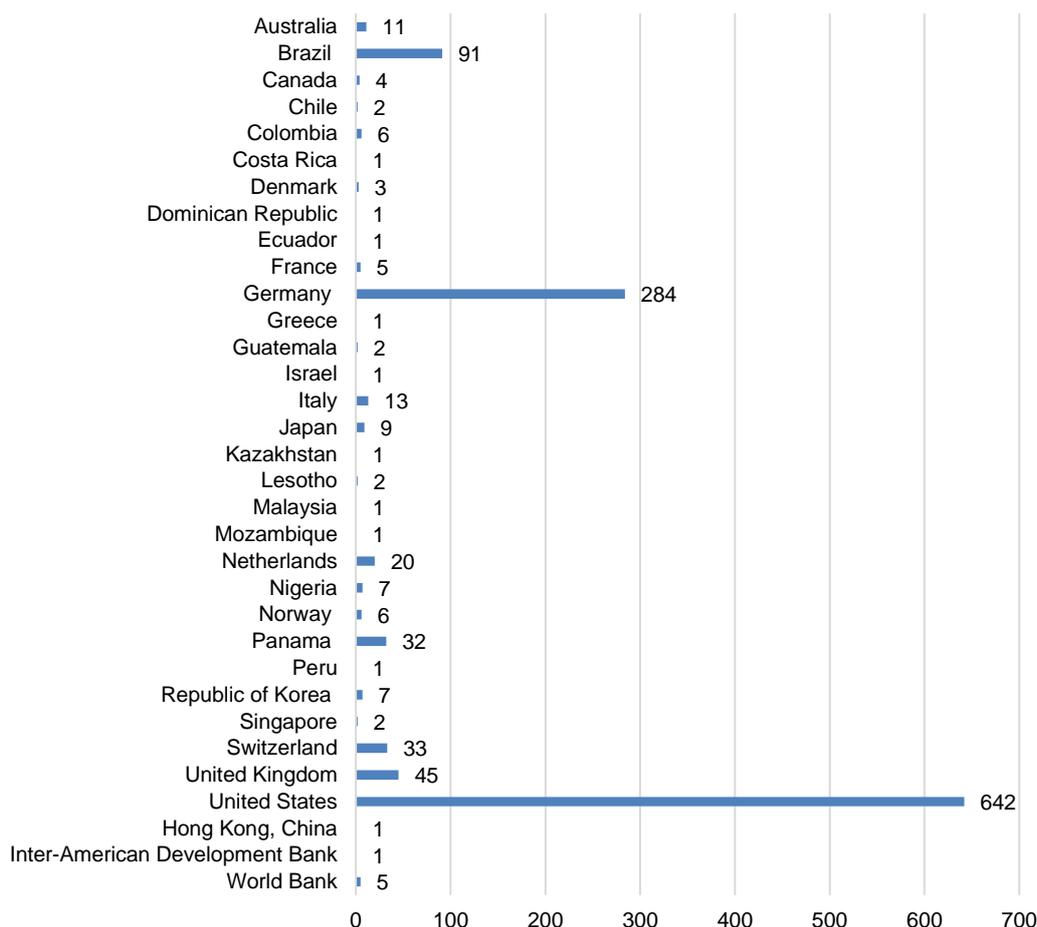


Source: United Nations Office on Drugs and Crime (UNODC) (May 2021).

14. Figure II below shows that Germany and the United States of America continue to be the most active in the enforcement of settlements, while Brazil, France, the Netherlands, Panama, Switzerland and the United Kingdom of Great Britain and Northern Ireland have stepped up their enforcement efforts in recent years.

129 cases, defendants had been convicted following a full trial, acquitted or their cases dropped or dismissed. Newly available information on pre-2016 cases was incorporated into the updated database.

Figure II
**Number of settlements by jurisdictions and multilateral development banks
 (1999–May 2021)**



Source: UNODC (May 2021).

Enforcement by affected countries

15. *Left Out of the Bargain* had raised concerns over the low level of enforcement by the affected countries, and included a recommendation that they step up their own efforts to mount effective investigations and prosecutions against the providers and recipients of bribes, noting in part that that would greatly improve their prospects of recovering assets. Since the study, the number of affected countries using settlements has nearly doubled, from 17 in mid-2012 to 32 as of May 2021. Nearly all of this increase is attributable to settlements related to the Operação Lava Jato (Operation Car Wash) case involving the Brazilian company Odebrecht S.A.⁶

Brazil: Odebrecht S.A.

16. As part of Operation Car Wash, Brazil greatly expanded its enforcement, resulting in nearly 100 settlements with individuals and legal persons. The cases involved also led to the participation of Brazil in multi-jurisdictional settlements with other countries, including Switzerland, the United Kingdom and the United States, resulting in the sharing of monetary sanctions ordered in such cases as those involving Rolls-Royce PLC, Embraer S.A., J&F Investimentos S.A., Samsung Heavy Industries and SBM Offshore N.V.

17. The Odebrecht S.A. cases are particularly significant. As described by the Department of Justice of the United States, the company engaged in a massive and unparalleled bribery and bid-rigging scheme for more than a decade, beginning as

⁶ In December 2020, the company changed its name to Novonor.

early as 2001. During that time, Odebrecht S.A. paid approximately \$788 million in bribes to government officials, their representatives and political parties in a number of countries in order to win business in those countries. The criminal conduct was directed by the highest levels of the company, with the bribes paid through a complex network of shell companies, off-book transactions and offshore bank accounts.

18. In addition to its own enforcement efforts, Brazil provided assistance to its neighbouring countries' investigations into Odebrecht S.A. In 2016, the company settled with the Brazilian Federal Prosecution Service, the Department of Justice of the United States and the Office of the Attorney General of Switzerland and agreed to pay at least \$3.5 billion in monetary sanctions. Colombia, the Dominican Republic, Ecuador, Guatemala, Panama and Peru also entered into settlement agreements with Odebrecht S.A. that appear to have resulted in asset returns. The company's resolution with the Inter-American Development Bank (IDB) included a \$50 million contribution by the company to non-governmental organizations and charities serving vulnerable communities in IDB member countries.

19. Another notable example of enforcement by an affected country, resulting in significant asset recovery for Malaysia, involved the Goldman Sachs Group. The case is discussed in section V below.

Other important developments

20. **Role of international development banks.** Settlements undertaken by the World Bank and IDB were included in the updated database, as they and other multilateral banks have an important role in the context of countering transnational corruption offences. Their enforcement actions also resulted in asset returns to affected countries.

21. **Change in the nature of cases.** Many of the cases involved a sizeable number of documents or had a broad and complex scope. The Serious Fraud Office of the United Kingdom noted that an estimated 30 million documents provided by Rolls-Royce PLC had to be analysed for material potentially covered by legal professional privilege. The use of artificial intelligence technologies by the Serious Fraud Office in that case is discussed in section VIII below.

22. **Increased international cooperation.** Owing to their transnational nature, the cases required assistance from and cooperation among authorities in different countries. As an example, the case of VimpelCom Limited and other companies and assets related to the case resulted in settlements in France, the Netherlands, Switzerland, the United Kingdom and the United States and an administrative enforcement action in Norway. In announcing the resolution with VimpelCom, the Department of Justice of the United States acknowledged the significant cooperation and assistance of law enforcement colleagues in the Public Prosecution Service of the Netherlands, the Prosecution Authority of Sweden, the Office of the Attorney General of Switzerland and the Corruption Prevention and Combating Bureau of Latvia, as well as Belgium, France, Ireland, Luxembourg and the United Kingdom.

23. The Serious Fraud Office investigation into the Alstom S.A.-related cases involved cooperation with more than 30 countries, including Austria, Canada, Cyprus, Czechia, Denmark, France, Hungary, India, Liechtenstein, Lithuania, Seychelles, Singapore, Slovakia, Sweden, Switzerland and Tunisia.

24. **Settlements with individuals.** Among the cases of individuals, the largest confiscation order was against a former national treasurer (2007–2011) of the Bolivarian Republic of Venezuela, who pleaded guilty in the United States to a charge of money-laundering conspiracy and agreed to forfeit \$1 billion in criminal proceeds consisting of real estate in south Florida, horses, luxury vehicles and watches, as well as assets held in accounts in financial institutions in Switzerland and the United States.

25. **Role of financial institutions.** In addition to settlements with financial institutions to resolve the bribery allegations against them, settlements with financial

institutions for serious deficiencies in their safeguards against money-laundering and the financing of terrorism have been included in the updated case database. For example, in 2018, ING Bank N.V. entered into a settlement with the Public Prosecution Service of the Netherlands, which had accused the bank of violating the Anti-Money-Laundering and Counter Terrorism Financing Act for many years and on a structural basis. The bank had also been accused of culpable money-laundering for failing to prevent bank accounts held by ING clients in the Netherlands from being used to launder hundreds of millions of euros between 2010 and 2016. One example of a client cited by the Public Prosecution Service was an international telecoms provider that had transferred bribes worth tens of millions of dollars through its bank accounts to a company that was owned by the daughter of the then President of Uzbekistan. The bank was also accused of reporting the unusual transactions to the financial intelligence unit far too late and of not sufficiently investigating the identity of the actual owner of the company.

26. Most recently, in May 2021, the financial supervisory authority of Norway, Finanstilsynet, announced that, during its 2020 inspection of DNB Bank, the authority had also investigated the bank's handling of its customer relationship with companies in the Samherji Group, which had been under investigation by Icelandic authorities for alleged bribery of public officials in Namibia. Finanstilsynet concluded that the offences uncovered in connection with the Samherji case related mainly to matters that were time-barred or had occurred under the former Anti-Money Laundering Act, in which there was no legal basis for imposing administrative sanctions. However, the inspection report led to findings of serious breaches in the bank's compliance with the Anti-Money-Laundering Act and a fine of \$48,100,000 was imposed.

27. **Designated non-financial businesses and professions and misuse of shell companies.** It is beyond the scope of the present document to delve into the involvement of other professional intermediaries, such as lawyers, accountants, trust services, company service providers and others who work in what is referred to as designated non-financial businesses and professions. However, the lack of detail in the settlement agreements regarding the involvement of and enforcement against designated non-financial businesses and professions, particularly in cases with money-laundering-related charges, was notable. Some of the settlement agreements, in their factual proffer, also described the misuse of shell companies (often identified by name and jurisdiction of incorporation) as part of money-laundering schemes to conceal the origin and/or destination of proceeds of crime.

28. What actions, if any, were taken by relevant jurisdictions in this regard is not known from the settlement documents.

IV. Settlements and transparency

29. In *Left Out of the Bargain*, the lack of publicly available information on the use of settlements in many jurisdictions was noted. Nearly a decade later, information about settlement cases is publicly available in about two thirds of the States parties that responded to the United Nations Office on Drugs and Crime (UNODC) questionnaire. The sources of information include public websites of enforcement and supervisory authorities or the relevant courts. The degree to which the information is available varies greatly.

30. In the United States, an additional resource, the web-based database Pacer.Gov – publicly available for a small fee – provides access to the dockets of all open and closed United States federal court cases. It offers the possibility to view and download all documents filed in the cases except those sealed by the court, for example, to protect the identity of witnesses or to safeguard sensitive ongoing case investigation information.

31. Brazil, Colombia, the Dominican Republic, Ecuador, France, Guatemala, the Netherlands and the United Kingdom have also published information on their settlements. Brazil, France and the United Kingdom have posted entire texts of their

settlement agreements on publicly accessible websites, as well as explanations of both the legal basis for the settlements and the policy goals of accountability, efficiency and efficacy underlying the use of settlement mechanisms.

32. Relatively less information about cases is publicly available in civil-law jurisdictions such as Germany, Italy and Kazakhstan owing to the stringent privacy protections afforded to individual defendants. However, the efforts of the Office of the Attorney General of Switzerland to make more information publicly available about the progress and resolution of cases, particularly cases in which there are asset recovery implications under article 57 of the Convention against Corruption, are notable.

V. Monetary sanctions

33. As noted in *Left Out of the Bargain*, there are several types of monetary sanctions that are typically included as part of settlements:

(a) “Confiscation” (also known as “forfeiture”) is the permanent deprivation of assets by order of a court or other competent authority. There are three basic kinds: (i) criminal (conviction-based) confiscation, (ii) non-conviction-based confiscation, and (iii) administrative confiscation. Under domestic laws, confiscated assets are typically payable to the State, although they can also be used in some jurisdictions for restitution or compensation for victims;

(b) “Disgorgement” is mainly but not always a civil (as opposed to criminal) remedy in common-law jurisdictions. Unlike confiscation, this remedy is derived not from statute but from the courts’ power to correct unjust inequality. Similar to confiscation, disgorgement is the forced surrender of illegally obtained profits. In recent years, the Serious Fraud Office of the United Kingdom and the Department of Justice of the United States have imposed disgorgement in their settlements with legal persons;

(c) “Fines” are monetary sanctions meant to punish the wrongdoer. They can be imposed by civil, criminal or administrative procedures, and they are almost always payable to the State;

(d) “Restitution” is based on the principle that a person who has suffered loss as a result of a wrong committed against him or her must be restored as nearly as possible to their circumstance before the damage took place. Restitution can be either civil or criminal. In some jurisdictions, the court has the power to order the guilty party to pay restitution to the victim as part of a criminal conviction in an amount equal to the costs incurred by the victim as a result of the guilty party’s actions;

(e) “Compensation” is similar to restitution, in that a court may issue a compensation order in a criminal case where a victim has been identified in the proceedings and has proved that he or she suffered damage. The compensation order will often form part of the confiscation. However, as noted below with regard to the Gunvor case example in Switzerland, compensation can serve as a substitute for confiscation;

(f) “Reparations” can take various forms and the word is used with various meanings. For the purposes of the present document, the term means gratuitous or voluntary payments made by a wrongdoer to atone for harm caused. Such amounts could also be payable to a third party, such as a humanitarian organization.

Monetary sanctions ordered

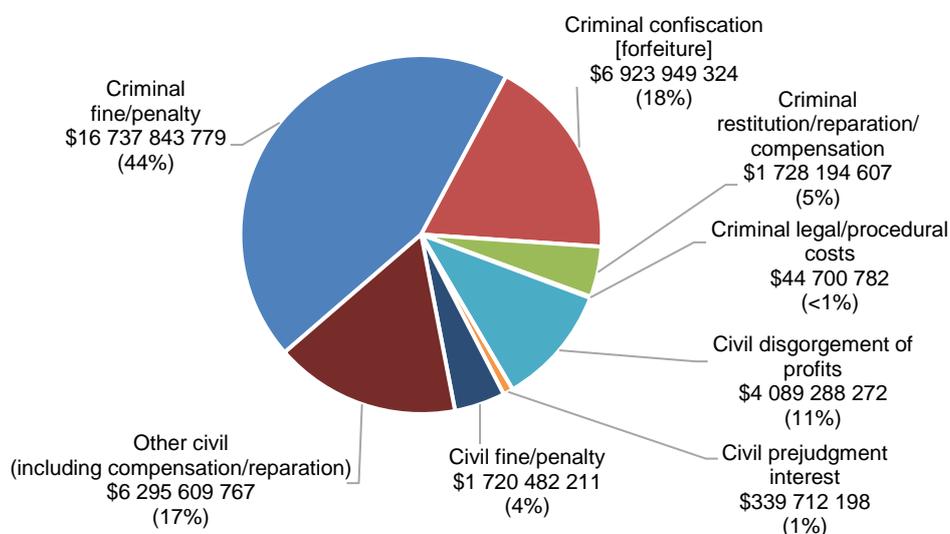
34. As noted in *Left Out of the Bargain*, a total of \$6.9 billion in monetary sanctions had been imposed in settlements from 1999 to mid-2012. By mid-2016, monetary sanctions totalled nearly \$10.9 billion.

35. As of May 2021, total monetary sanctions imposed were about \$37.88 billion,⁷ reflecting both the increase in enforcement and the large size of monetary sanctions, including those exceeding \$1 billion in settlements with companies in very large and complex cases, including Airbus SE and the Goldman Sachs Group. The largest settlements have not been limited to settlements with companies.

36. It should be noted that the amounts shown in figure III below are only the ordered amounts. In some of the largest settlements, the authorities and the companies agreed to payments in instalments spread over a number of years. For example, the 2017 Dominican Republic agreement with Odebrecht S.A. provided for a compensation or reparation payment of \$184 million, with the first payment of \$30 million due at the signing of the agreement and the remainder payable annually over an eight-year period. The agreement between Brazil and SBM Offshore provided for payments in three instalments.

37. The totals also include monetary sanctions ordered in cases of individuals in which the courts noted the defendants' inability to pay the ordered confiscation (forfeiture) or restitution.

Figure III
Monetary sanctions, by type (1999–May 2021)



Source: UNODC (May 2021)

Monetary sanctions resulting from enforcement by affected countries

38. As of May 2021, about \$11.58 billion of the \$37.88 billion in total monetary sanctions ordered had been the result of enforcement by the affected countries. While this figure shows that greater enforcement by affected countries appears to have led to greater asset recovery, about 87 per cent of this amount is accounted for by just two countries: Brazil and Malaysia. For Colombia, the Dominican Republic, Guatemala and Peru, the most significant (if not sole) settlements related to one company, namely Odebrecht S.A. These important achievements will hopefully serve to encourage more affected countries to undertake their own enforcement actions. Figure IV below shows enforcement by number of cases and figure V below shows the amounts of sanctions imposed by country.⁸

⁷ Information provided did not always include precise data on monetary sanctions. When, for example, a range was given, the lowest amount was entered into the database.

⁸ Details of the monetary sanction amount in the one case in the United Kingdom are unknown, and as such, the United Kingdom does not appear in figure V.

Figure IV
Enforcement by affected countries, number of cases (1999–May 2021)

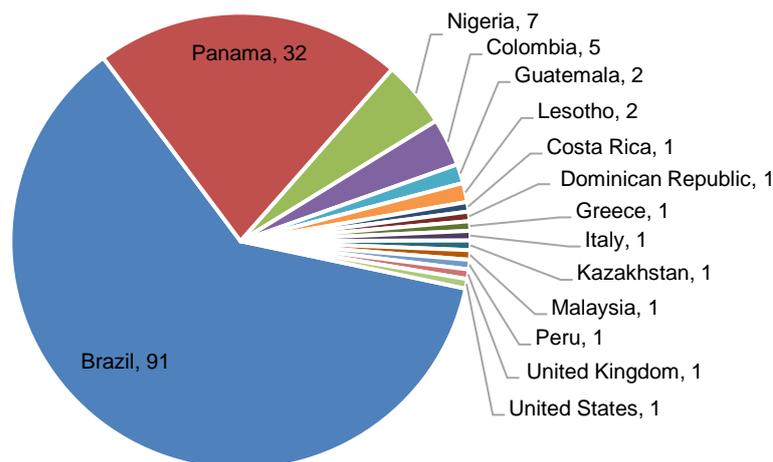
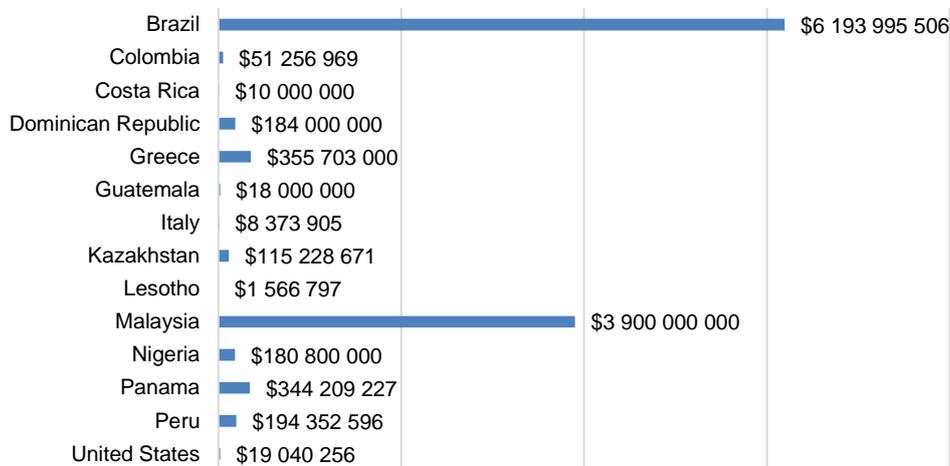


Figure V
Monetary sanctions resulting from enforcement by affected countries (1999–May 2021)



Source: UNODC (May 2021).

Enforcement by affected country: Malaysia and Goldman Sachs Group

In October 2020, Goldman Sachs Group Inc. and Goldman Sachs (Malaysia) Sdn. Bhd., its Malaysian subsidiary, admitted to a court in the United States of America that they had conspired to violate the Foreign Corrupt Practices Act in connection with a scheme to pay over \$1 billion in bribes to officials in Malaysia and the United Arab Emirates to obtain business, including by underwriting approximately \$6.5 billion in three bond deals for 1Malaysia Development Bhd. (1MDB). Under its agreement with the Department of Justice of the United States, Goldman Sachs was to pay a criminal penalty and disgorgement of over \$2.9 billion to the United States. Goldman Sachs also reached separate parallel resolutions with foreign authorities in Malaysia, Singapore, the United Kingdom of Great Britain and Northern Ireland and elsewhere, along with domestic authorities in the United States. The department was to credit over \$1.6 billion in payments with respect to those resolutions.

According to Goldman Sachs, the company’s \$3.9 billion agreement with the Government of Malaysia included: (a) payment to the Government of Malaysia of \$2.5 billion; and (b) a guarantee that the Government of Malaysia received at least \$1.4 billion in proceeds from assets related to 1MDB seized by government authorities around the world. The company also agreed to pay the United States Securities and Exchange Commission \$606.3 million in disgorgement, which was

deemed to have been satisfied by payment previously made to the Government of Malaysia and IMDB, pursuant to Goldman Sachs' settlement with the Government.

This illustrates the difficulty of piecing together the connections between settlements by multiple jurisdictions in a related case solely through public statements and public sources of information.

VI. Confiscation of proceeds of crime

39. Article 2 of the Convention against Corruption (Use of terms) provides that both “proceeds of crime” and “confiscation” are to be interpreted broadly:

(e) “Proceeds of crime” shall mean any property derived from or obtained, directly or indirectly, through the commission of an offence;

[...]

(g) “Confiscation,” which includes forfeiture where applicable, shall mean the permanent deprivation of property by order of a court or other competent authority;

40. Article 31 of the Convention outlines obligations of States parties with regard to the freezing, seizure and confiscation of proceeds of crime:

4. If such proceeds of crime have been transformed or converted, in part or in full, into other property, such property shall be liable to the measures referred to in this article instead of the proceeds.

5. If such proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds.

6. Income or other benefits derived from such proceeds of crime, from property into which such proceeds of crime have been transformed or converted or from property with which such proceeds of crime have been intermingled shall also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds of crime.

41. According to research conducted by UNODC for the present document, and as shown in table 1 below, from 1999 to May 2021, enforcement countries had ordered about \$6.78 billion in confiscations of proceeds of crime.

Table 1
Confiscation of proceeds of crime in enforcement countries (1999–May 2021)

<i>Enforcement country</i>	<i>Amount (dollars)</i>
Australia	22 316 000
Denmark	6 293 620
France	71 148 360
Germany	1 332 438 230
Israel	625 000
Italy	19 894 257
Netherlands	1 549 569 274
Norway	2 025 490
Switzerland	334 982 395
United Kingdom of Great Britain and Northern Ireland	1 140 899 388
United States of America	2 306 290 020
Total	6 786 482 034

Source: UNODC (May 2021).

42. Most of these confiscations fit into the traditionally understood concept of confiscation of proceeds of crime. In a common law jurisdiction, for instance, as part of a settlement, an individual defendant pleads guilty to criminal charges and the criminal proceeds are confiscated and/or forfeited pursuant to a court order. However, in some instances, while not using the exact term “confiscation”, the actions seem to constitute de facto confiscations.

43. For example, in 2019, the Office of the Attorney General of Switzerland ordered Gunvor Ltd. to pay 90 million Swiss francs as compensation because, under article 71, paragraph 1, of the Swiss Criminal Code, compensation is payable if there are no assets directly available for forfeiture. The Office of the Attorney General also stated that the 90 million Swiss francs corresponded to the total profit that Gunvor had made from the business in question in the Congo and Côte d’Ivoire.

44. As stated in paragraph 39 above, article 2 of the Convention against Corruption defines “proceeds of crime” that could be subject to confiscation as “any property derived from or obtained, directly or indirectly, through the commission of an offence”. In addition, article 31, paragraph 6, specifically stipulates that income or other benefits derived from the proceeds of criminal offences shall be subject to confiscation.

45. The possibility for Swiss or other authorities to substitute another form of monetary sanction when confiscation of proceeds of crime is not possible, owing to either a lack of legal basis or practical considerations, raises an interesting point of discussion for the Working Group in determining whether some forms of monetary sanctions imposed in settlement case could be considered confiscation.

46. Some types of monetary sanctions imposed by Germany, the United Kingdom and the United States may merit an additional discussion on their nature within the broad use of the terms “proceeds” and “confiscation” under the Convention against Corruption.

United Kingdom, Serious Fraud Office

47. During the period from 1999 to mid-2021, the United Kingdom ordered confiscation as part of cases resolved through a guilty plea by legal persons and individuals. However, since 2015, the Serious Fraud Office has concluded deferred prosecution agreements with seven legal persons that have resulted in disgorgements totalling \$1,109,155,830. Prior to the introduction of deferred prosecution agreements, the Civil Recovery Order (Proceeds of Crime Act) had been used to resolve foreign bribery cases and impose monetary sanctions against legal persons, resulting in the recovery of \$62,378,717. The question is whether the disgorgements ordered as part of the deferred prosecution agreements and the sanctions under the Civil Recovery Order fall under the Convention against Corruption definitions of “confiscation” and “proceeds of crime”.

Germany, confiscations imposed under the Administrative Offences Act

48. As of May 2021, confiscations from legal persons had been ordered by public prosecutors in Germany in 16 cases. The amounts involved totalled about \$1.33 billion.⁹ The cases were resolved under section 29 (a), section 30 and section 130 of the Administrative Offences Act.

49. As noted by the Organisation for Economic Co-operation and Development (OECD), in Germany, no legal provision expressly affords the possibility for a legal person to resolve a case with the prosecution authorities in a non-trial resolution per se. In certain cases, a legal person can be held liable and sanctioned by the prosecution authorities under the administrative offence of violation of supervisory duties by a senior manager. Prosecutors in some states of the country have used forfeiture orders under section 29 (a) of the Administrative Offences Act as non-trial resolutions with

⁹ The amount of forfeiture in one of the cases was not specified.

companies that have self-reported and cooperated. The use of forfeiture orders to resolve a case with a legal person is based on the administrative offence of violation of supervisory duties by a senior manager but does not establish corporate liability. Such resolutions allow for the recovery of illicit gains from companies while not holding them liable (and without imposing a regulatory fine).¹⁰

United States, Department of Justice, confiscation and disgorgement

50. The practice in Germany of prosecutors employing an administrative law to resolve criminal cases can be distinguished from the practice in the United States, where in nearly all foreign bribery cases, the Department of Justice and its prosecutors resolve criminal charges by using criminal statutes as a legal basis, while the Securities and Exchange Commission resolves civil or administrative charges through civil or administrative proceedings.

51. Interestingly, the Department of Justice's settlement agreement with Walmart's Brazilian subsidiary WMT Brasilia S.a.r.l. included confiscation or forfeiture of profits, while disgorgement of profits was imposed in its settlements with the Insurance Corporation of Barbados Limited and HMT LLC, against neither of which was there any parallel Securities and Exchange Commission enforcement proceeding, as they were not publicly listed companies.

VII. Asset recovery and asset return

52. As noted in paragraphs 35 and 38 above, as of May 2021, about \$37.88 billion in monetary sanctions had been imposed in settlements of foreign bribery and related cases. About \$11.58 billion of that amount is made up of monetary sanctions resulting from settlements undertaken by the affected countries (see figure V above), including Brazil and Malaysia as part of multi-jurisdictional resolutions. Nearly \$6.8 billion is made up of confiscations ordered by enforcement countries (see table 1 above).

53. As shown in table 2 below, since the 2016 note by the Secretariat ([CAC/COSP/WG.2/2016/2](#)), nearly \$283 million in assets has been ordered returned to the affected countries from enforcement countries and IDB.

¹⁰ OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention* (2019), box 4.

Table 2
Assets returned or ordered returned by enforcement countries (mid-2016 to May 2021)^a

<i>Case name</i>	<i>Enforcement country/territory or organization</i>	<i>Country of foreign public official(s)</i>	<i>Year of settlement</i>	<i>Legal form of settlement</i>	<i>Monetary sanction (type)</i>	<i>Monetary sanction returned or ordered returned (dollars)</i>
Uzbekistan/ Real properties	France	Uzbekistan	2019	Plea bargain in summary proceedings	Criminal forfeiture	\$71 148 360
Odebrecht S.A./CNO S.A. (subsidiary)	Inter-American Development Bank	Brazil, Venezuela (Bolivarian Republic of)	2019	Negotiated resolution agreement	Administrative process (contributions to non-governmental organizations and charities)	\$50 000 000
Uzbekistan/ Telecom case related	Switzerland	Uzbekistan	2018	Summary punishment order	Forfeiture	\$144 146 600
Servicios di Telecomunicacion di Aruba N.V. (“SETAR”)/and PEP	United States of America	Aruba	2018	Guilty plea	Criminal restitution	\$1 308 500
Servicios di Telecomunicacion di Aruba N.V. (“SETAR”)	United States of America	Aruba	2017	Guilty plea	Criminal restitution	\$701 750
Alstom Power Ltd.	United Kingdom of Great Britain and Northern Ireland	Lithuania	2016	Guilty plea	Compensation	\$15 504 719
Total						\$282 809 929

^a The monetary sanctions “returned” to affected countries as part of their participation in multi-jurisdictional settlements have not been included in this table. Those amounts have been reflected in figure V.

Source: UNODC (May 2021).

54. Article 53 of the Convention against Corruption, on measures for direct recovery of property, requires each State party, in accordance with its domestic law, to take such measures as may be necessary to permit its courts to order those who have committed offences established in accordance with the Convention to pay compensation or damages to another State party that has been harmed by such offences.

55. Article 57, paragraph 3 (c), urges States parties to give priority consideration to returning confiscated property to requesting States parties, returning such property to its prior legitimate owners or compensating the victims of the crime.

56. In the *US v. Koolman* case, it was essential for the government of Aruba to be recognized as a victim entitled to restitution by a court in the United States. A former official of Servicio di Telecomunicacion di Aruba N.V. (SETAR), who was a Dutch citizen residing in Miami, was ordered by the United States District Court for the Southern District of Florida to pay \$1,308,500 in restitution to SETAR, which the Court had deemed to be the victim in the case. However, the Court also noted that the defendant did not have the ability to pay, as he had already spent his bribery proceeds on, among other things, gambling and travelling, sponsoring a soccer league and paying for his father’s medical and, later, funeral expenses.

VIII. Observations on challenges and good practices

Growing complexity of cases, costs and use of technology

57. Subsequent to the 2017 Rolls-Royce PLC deferred prosecution agreement with the Serious Fraud Office of the United Kingdom, that Office announced that it was the first case in which it had used new artificial intelligence technology to analyse an estimated more than 30 million documents provided by the company for material potentially covered by legal professional privilege, and that such technology would be available in all future cases. It reported that a “robo-lawyer” was able to process more than half a million documents a day at speeds 2,000 times faster than a human lawyer and that, previously, only independent barristers had been used to comb through thousands of complex documents to identify evidence that could or could not be seen by Serious Fraud Office investigators prior to them even beginning to sift through the documents themselves. A new artificial intelligence-powered document review system was also being rolled out. The cost of the new technology is not known, but legal costs are routinely included in the Serious Fraud Office’s settlements, including 13 million pounds in the Rolls-Royce case.

58. As cases grow in size and complexity, countries will have to explore ways to fund their investigations, including ways to invest in new technologies. The leniency agreement between Brazil and the company SBM Offshore provided for \$6.8 million in monetary sanctions to the Council of Control of Financial Activities for the implementation of units for massive electronic processing of information and other instruments to be used in the prevention and combating of corruption by that Council and the Federal Prosecution Service.

59. Financial resources for investigations may be available through mechanisms such as the Assets Forfeiture Fund of the Department of Justice of the United States, which provides for “equitable sharing payments”. These are amounts paid to state and local law enforcement agencies and foreign Governments for assistance in forfeiture cases. The Department of Justice notes that equitable sharing payments must reflect the degree of direct participation in law enforcement efforts resulting in forfeiture.¹¹

International cooperation

60. While the settlement cases attest to an increase in international cooperation, Saudi Arabia stated, in its response to the questionnaire, that one of the most significant challenges lay in the lack of cooperation by some countries in implementing the terms of the settlement agreements concluded by the competent authorities with those involved in corruption cases, which consequently hindered and affected the process of reclaiming and returning the stolen public funds from abroad. Saudi Arabia also asserted that establishing clear and simple legal mechanisms for settlements under the Convention against Corruption would serve the efforts of Member States to detect corrupt practices and would speed up the process of asset recovery through facilitating cooperation among Member States for the recovery of stolen public funds from abroad.

61. In its response to the questionnaire, the Netherlands stated that it could be a challenge, or at least it was more complex, to enforce a non-trial resolution if the assets were abroad. Enforcement could not be done by means of regular mutual legal assistance in most circumstances and, in cross-border situations, the cooperation of the defendant was necessary. In practice, that was a possibility for the settlements and transactions because, in the Dutch system, those are only applied in a situation where there was a cooperating defendant. Cross-border enforcement of a penal order of the public prosecutor was not possible. Therefore, the use of penal orders in corruption cases with foreign defendants and assets was not expedient. The Netherlands also recommended, as a possible solution, an international agreement for mutual legal

¹¹ More information on the Assets Forfeiture Fund is available at <http://justice.gov/afp/fund#po3>; the Fund’s annual reports also provide information on asset-sharing with foreign Governments.

assistance between judicial authorities of different States to enforce non-trial and non-court decisions, which would make it easier and more efficient to finalize the confiscation of assets (like immovable property) abroad in case of a settlement, transaction or penal order.

Principles on compensation of victims

62. One outcome of the Anti-Corruption Summit held in London in 2016 was the United Kingdom General Principles to compensate overseas victims (including affected States) in bribery, corruption and economic crimes cases. The guidance to the General Principles states that, where the victim is an overseas person or State, consideration should be given to seeking an agreement with government partners that funds received under the confiscation order be paid in lieu of compensation to that victim. That would be an entirely voluntary decision on the part of the Government of the United Kingdom and the relevant departments.

IX. Discussion at the fifteenth meeting of the Working Group

63. The secretariat presented the analysis referred to above, as well as the updated case database, to the Open-ended Intergovernmental Working Group on Asset Recovery and organized a thematic panel discussion on the topic. Presentations were made by panellists from Nigeria, Panama, the United States and OECD (see [CAC/COSP/WG.2/2021/5](#)).

64. In the ensuing discussion, speakers outlined the mechanisms within their domestic systems that provided alternatives to the judicial process for discovering illicit activity and recovering stolen assets. Several speakers stressed the importance of cooperation in general, and of global resolutions in particular cases, among all States involved in alternative mechanisms.

65. In response to a question concerning the return of assets following the conclusion of settlements, the panellist from the United States explained that, despite the broad scope of the Convention, not all settlements fell within the scope of article 57. In relation to good practices, he referred to successful asset recovery cases, including the case of the IMDB state investment fund, which involved the use of confiscation proceedings, the return of part of the settlement proceeds to other jurisdictions and parallel investigations. He highlighted the importance of international cooperation in that case, which provided a good example of the use of the Convention that had involved Malaysia, Singapore, the United Kingdom and the United States.

66. In response to a question from a speaker, a panellist from OECD explained that plea agreements did not affect confiscation, but they could have an impact on the amount of monetary fines. The panellist from the United States noted that, in his country, a defendant could be required to cooperate as a condition of plea agreements, and the level of cooperation would be reflected in the sentencing stage, thus creating incentives for defendants to cooperate.

X. Conclusions

67. Settlements have become an important tool for an increasingly diverse group of developing and developed countries in resolving cases of foreign bribery and related offences.

68. A significant gap remains between the amounts realized through settlements and those returned to the countries whose public officials were allegedly bribed. Brazil and Malaysia are notable exceptions, and their experience could be highly valuable, particularly with regard to their participation in multi-jurisdictional settlements and recognition of their legitimate ownership of proceeds of corruption offences.

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

70. It is important to further clarify which of the monetary sanctions constitute de facto confiscation and what constitutes proceeds of crime and hence relevant asset return to affected countries or other victims in accordance with the Convention.

71. The Conference may wish to consider ways to enhance the implementation of article 56 of the Convention, on spontaneous information-sharing with affected States parties, particularly in the context of employing alternative legal mechanisms and non-trial resolutions, including settlements that have proceeds of crime for confiscation and return.

72. The Conference may wish to encourage States parties to consider exploring new technologies to help settlement processes become more efficient.

73. The Conference may also wish to encourage States parties to consider exploring new and existing avenues, including provisions in settlement agreements, regarding financial resources for enforcement of foreign bribery cases not just within their own jurisdictions but also to assist smaller jurisdictions in their enforcement efforts.

74. In recent years, a growing number of affected countries have undertaken enforcement efforts and achieved asset recovery. The Conference may wish to encourage States parties to consider further expanding informal and formal channels of communication and cooperation in order that more jurisdictions can undertake their own enforcement actions and participate effectively in multi-jurisdictional enforcements.

75. The Conference may also wish to encourage States parties to consider ways to enhance the implementation of article 53, paragraph (c), of the Convention, on domestic legal mechanisms and procedures allowing the recognition of other States parties' claims as legitimate owners of corruption proceeds in confiscation proceedings, particularly in the context of employing alternative legal mechanisms and non-trial resolutions, including settlements that have proceeds of crime for confiscation and return.
