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**Thematic discussions: thematic discussion on States
parties' use of settlements and other alternative
mechanisms**

Settlements and other alternative mechanisms in transnational bribery cases and their implications for the recovery and return of stolen assets

Note by the Secretariat

Summary

In its resolution 6/2, entitled “Facilitating international cooperation in asset recovery and the return of proceeds of crime”, the Conference of the States Parties to the United Nations Convention against Corruption noted the growing practice of the use of settlements and other alternative legal mechanisms by States parties in concluding transnational bribery cases and called upon States parties to give due consideration to the involvement of the jurisdictions where the bribery schemes originated or where foreign officials were bribed. The Conference also called for urgent attention to the fact that a study by the Stolen Asset Recovery (StAR) Initiative of the United Nations Office on Drugs and Crime and the World Bank, entitled *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, had indicated that, of the more than \$6.2 billion realized so far through settlements worldwide, not more than 3 per cent had been returned to States whose officials had been bribed and where corrupt transactions had taken place, which was a key aim of chapter V of the Convention.

* Reissued for technical reasons on 10 August 2016.

** CAC/COSP/WG.2/2016/1.



In the same resolution, the Conference directed the Open-ended Intergovernmental Working Group on Asset Recovery to, inter alia, collect information, with the support of the Secretariat, regarding States 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 for cooperation among affected States parties and effective return, and report its findings on each of those matters to the Conference at its subsequent session, with the support of the Secretariat. The Conference also encouraged States parties to enhance international cooperation and asset recovery by interpreting terms such as "proceeds of crime" and "victims of crime" in a manner consistent with the Convention.

Also in the same resolution, the Conference urged States parties that are using settlement and other alternative legal mechanisms to resolve corruption-related cases to proactively share information without prior request so as to engage all the States parties concerned early in the process, in accordance with article 46, paragraph 4, article 48, paragraph 1 (f), and article 56 of the Convention.

In its resolution 6/3, entitled "Fostering effective asset recovery", the Conference encouraged States parties to make widely available information on their legal frameworks and procedures, including those used in settlements and alternative legal mechanisms, in a practical guide or other format designed to facilitate use by other States, and to consider, where appropriate, the publication of that information in other languages.

The present note has been prepared pursuant to resolutions 6/2 and 6/3 and builds on the data and analysis contained in *Left Out of the Bargain* and its companion database of settlements in foreign bribery and related cases.

I. Introduction

1. Since the publication, in 2013, of a study by the Stolen Asset Recovery (StAR) Initiative of the United Nations Office on Drugs and Crime and the World Bank, entitled *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*¹ and the companion database of settlements in foreign bribery cases,² global understanding of and interest in settlements have grown.

2. The aim of *Left Out of the Bargain* 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.

3. Based on the analysis of a total of 395 foreign bribery cases, which had been concluded through settlements between 1999 and mid-2012, the study drew, inter alia, the following conclusions:

(a) At the time of the study, enforcement actions against foreign bribery had increased, largely due to the effective use of settlements in a steadily increasing number of jurisdictions;

(b) Settlements were increasingly being used to resolve cases of foreign bribery and related offences, both in developed and, to a lesser extent, in developing countries. From a domestic enforcement perspective, law enforcement and judicial authorities considered settlements an efficient and effective tool to handle complex cases of foreign bribery;

(c) The Convention against Corruption and other relevant international legal instruments did not explicitly deal with settlements. However, chapter 5 of the Convention established as a fundamental principle the recovery and return of assets to prior legitimate owners and those harmed. It provided countries with a comprehensive set of legal avenues for successful cooperation in the tracing, seizing, confiscating, and recovering of the proceeds of corruption;

(d) Settlements had been concluded, for the most part, without the involvement or cooperation of the jurisdictions whose officials were allegedly bribed;

(e) At the same time, there was very limited information on law enforcement action taken in the jurisdictions whose officials were allegedly bribed, against those officials as well as the payers of bribes, even when the authorities in the jurisdictions concerned became aware of such cases;

(f) Monetary sanctions imposed as part of those settlements were very significant, exceeding \$6.9 billion between 1999 and July 2012;

(g) Of that \$6.9 billion, 5.9 billion was imposed in the settling jurisdictions against companies or individuals for bribes paid in other jurisdictions, mostly in developing countries. At the same time, only \$197 million, or 3.3 per cent of the \$5.9 billion, was ordered returned to the latter countries;

¹ Available at <http://star.worldbank.org/star/sites/star/files/9781464800863.pdf>.

² Available at <http://star.worldbank.org/corruption-cases/assetrecovery>.

(h) About \$556 million in monetary sanctions were imposed by countries whose officials were allegedly bribed and from which the related contracts or projects originated;

(i) In view of the legal framework provided by the Convention against Corruption, the very small share of monetary sanctions ultimately returned to the countries whose officials were allegedly bribed raised questions: notably, whether settlements in practice hinder the effective application of the relevant provisions of the Convention;

(j) A range of options could be used to address settlement-specific challenges to asset recovery, including the following:

(i) Countries should develop a clear legal framework regulating the conditions and process of settlements;

(ii) Countries pursuing settlements should, wherever possible, seek to transmit information proactively to other affected countries³ concerning basic facts of the case, in line with article 46, paragraph 4, and article 56 of the Convention;

(iii) Where applicable, countries pursuing corruption cases could inform other potentially affected countries of the legal avenues available under their legal system to participate in the investigation and/or claim damages suffered as a result of the corruption;

(iv) Countries should consider permitting their courts or other competent authorities to recognize the claims of other affected countries when deciding on confiscations in the context of settlements, consistent with article 53, paragraph (c), of the Convention;

(v) Publishing settlement agreements widely did not necessarily result in other affected countries learning about the cases before, during or after the settlements were conducted. Countries often did not find out about settlements until after they were concluded, and they sometimes did not learn about them at all. Therefore, countries could further proactively share information pertaining to concluded settlements with other potentially affected countries. Such information could include the exact terms of the settlement, the underlying facts of the case, the content of any self-disclosure, and any evidence gathered by the investigation. That information could enable other affected countries to undertake the following:

a. Initiate law enforcement actions within their own jurisdiction against the payers and recipients of bribes, as well as any intermediaries;

b. Seek mutual legal assistance from countries pursuing cases;

c. Pursue the recovery of assets through international cooperation in criminal matters;

d. Pursue the recovery of assets through private civil litigation;

³ In the present note, “affected country” and “affected State” mean the State whose public officials were allegedly bribed.

- e. Participate formally in the initiating jurisdiction's investigation and/or prosecution, with a view to pursuing compensation for damages suffered;
 - f. Seek to annul or rescind any public contracts that were concluded in the context of bribery cases;
 - g. Initiate actions for the debarment of companies as well as withdrawal of concessions and permits that have been granted as a result of the corruption;
 - h. Where applicable, monitor the compliance of companies with any resolutions of the settlement, obligating them to establish or reinforce their respective internal anti-corruption measures when conducting business transactions within the country's jurisdiction.
4. In line with resolution 6/2, the present note builds on the conclusions of *Left Out of the Bargain* by analysing additional data on settlements that were 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 has 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 remain;
 - (c) Affected countries and other victims have more frequently been involved in the conclusion of settlements and other alternative mechanisms since mid-2012.
5. The research methodology used to prepare the present note is the same as that employed to prepare *Left Out of the Bargain*. It was primarily based on the compilation of a database comprising settlements of 395 cases pertaining to foreign bribery and related offences. The database includes cases involving public enforcement of criminal, civil or administrative law against both legal and natural persons, for which the study drew on publicly available sources such as government enforcement agency websites, published court documents and peer review reports of the Working Group on Bribery in International Business Transactions of the Organization for Economic Cooperation and Development (OECD).

II. Use of settlements and other alternative mechanisms in concluding transnational bribery cases and the recovery and return of assets

Defining the term "settlement"

6. *Left Out of the Bargain* showed that 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 is then usually presented to a judge for confirmation. The most widely used mechanism in such cases is the guilty plea. 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 of America and out-of-court restitution agreements in Nigeria.

7. 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, agree to pay a specific sum of money or meet certain conditions, and thus avoid a long, drawn-out procedure.

8. While practitioners in civil law jurisdictions would be unlikely to describe the procedures used in their jurisdictions as settlements, those procedures seem to have enough in common with what happens in common law jurisdictions to justify considering them as belonging to the same category, for purposes of the present note. This provides an opportunity to consider similar developments with similar significant impact. In the present note, therefore, 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

9. 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, including Australia, Brazil, Canada, Costa Rica, Denmark, Germany, Greece, Italy, Japan, Kazakhstan, Lesotho, the Netherlands, Nigeria, Norway, Switzerland, the United Kingdom and the United States.

10. Since mid-2012, a number of significant settlements have been concluded, including by Switzerland with the Siemens Industrial Turbomachinery company. The media statement by the Office of the Attorney General of Switzerland described the essential components of the agreement: admission of responsibility by the company, coupled with payment of reparations to a designated charity — the International Committee of the Red Cross — and forfeiture of unlawfully obtained assets as compensation to the State.⁴

11. In Norway, a case of alleged foreign bribery was settled with the Norwegian company Torvald Klaveness, as the ultimate parent company of the indirectly owned Cabuenes Chartering AS. The resolution of the case included a number of elements common to settlements in other jurisdictions, such as self-reporting by the company of suspicions of bribery, undertaking an internal investigation, cooperation with the official investigation and payment of monetary sanctions — namely a criminal fine and criminal confiscation of proceeds of the bribery of Bahraini public officials.⁵

12. A significant development among common law jurisdictions is the introduction, in the United Kingdom in 2014, of the deferred prosecution agreement. According to the country’s Serious Fraud Office, deferred prosecution agreements enable a corporate body to make full reparation for criminal behaviour without the collateral damage of a conviction (for example sanctions or reputational damage that could put the company out of business and destroy the jobs and investments of

⁴ Office of the Attorney General of Switzerland, “Bribery relating to the construction of the Yamal Pipeline: Siemens subsidiary pays reparation”, 12 November 2013. Available at www.admin.ch/gov/en/start/dokumentation/medienmitteilungen.msg-id-50913.html.

⁵ See entry in the StAR database. Available at <http://star.worldbank.org/corruption-cases>.

innocent people).⁶ A deferred prosecution agreement is an agreement between a prosecutor and a company (but never an individual) that allows for the suspension of prosecution for a specified period of time as long as the company meets the conditions laid out in the agreement.

13. The Serious Fraud Office has pointed out that deferred prosecution agreements are concluded under the supervision of a judge, who must be convinced that the agreement is “in the interests of justice” and that the terms are “fair, reasonable and proportionate”. Under a deferred prosecution agreement, a prosecutor charges a company with a criminal offence but proceedings are automatically suspended if the agreement is approved by the judge. Unlike in the United States, a critical feature of the statutory scheme in the United Kingdom is the requirement that the courts examine the proposed agreement in detail, decide whether the statutory conditions are satisfied and, if appropriate, approve the deferred prosecution agreement.⁷

14. In the United States, settlements in criminal foreign bribery cases continue to be through plea agreements (predominantly used in cases involving individual defendants) and 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 PT China Technology Inc. case.⁸

15. The scope of judicial authority over prosecutorial discretion to enter into deferred prosecution agreements was the subject of a decision of 5 April 2016 of the United States Court of Appeals for the District of Columbia Circuit. Known as the “Fokker decision”, the case concerned the violation of the United States sanctions law (International Emergency Economic Powers Act) but has implications for foreign bribery and other corporate criminal settlements. In *United States v. Fokker Services B.V.*, the appellate court upheld the wide discretion of United States Department of Justice prosecutors to enter into deferred prosecution agreements and limited the authority of federal judges to challenge that discretion, noting that to do

⁶ Information available at www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements. See also Sentencing Council, *Fraud, Bribery and Money Laundering Offences: Definitive Guideline* (London, 2014). Available from www.sentencingcouncil.org.uk.

⁷ Southwark Crown Court, *Between: Serious Fraud Office and Standard Bank Plc (Now known as ICBC Standard Bank Plc)*, Case No. U20150854, Approved Judgment of 30 November 2015.

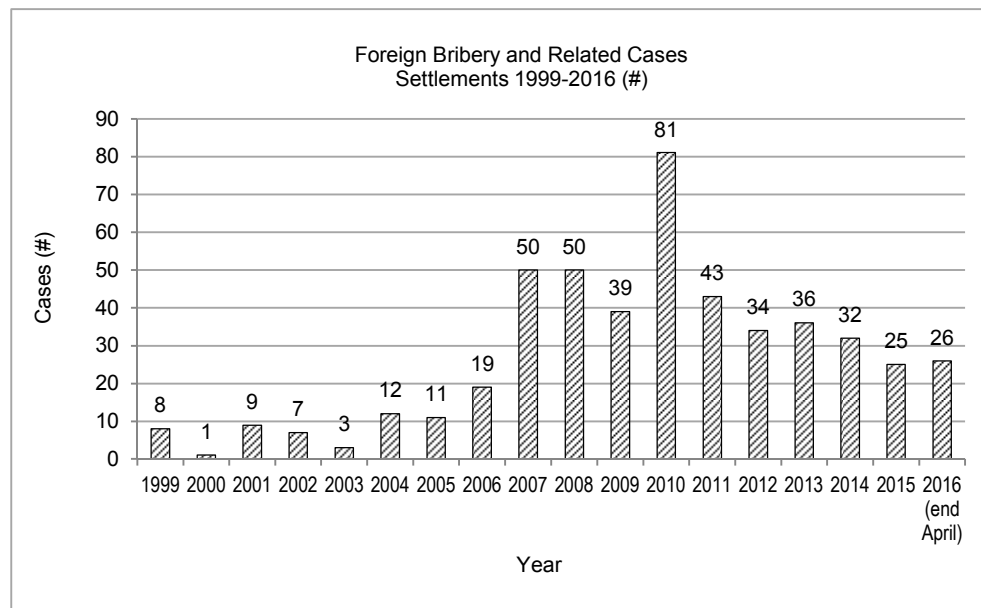
⁸ United States Securities and Exchange Commission, “Ralph Lauren Corporation, Non-prosecution agreement”, 22 April 2013 and “SEC announces non-prosecution agreement with Ralph Lauren Corporation involving FCPA misconduct”, 22 April 2013. In the PT China Technologies case, the Securities and Exchange 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”. Deferred prosecution agreement of 18 November 2015, and case information, available at <http://star.worldbank.org/corruption-cases/node/20443>.

otherwise would “impinge on the Executive’s constitutionally rooted primacy over criminal charging decisions”.⁹

16. In *Left Out of the Bargain*, the progress that had been made in the enforcement of foreign bribery cases from the early 2000s to mid-2012 was noted, with 2010 as the peak year for enforcement. As shown in figure I, 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 the United States authorities, the figure primarily reflects a declining use of settlements in foreign bribery cases in the United States.

Figure I

Foreign bribery and related cases: settlements, 1999 to end of April 2016



Source: UNODC/StAR Initiative.

Note: The figure does not include 46 additional cases in the database for which the year of the settlement was unspecified or noted as having taken place between 2005 and 2010.

17. At the same time, a number of other jurisdictions have commenced use of settlements to sanction foreign bribery cases (see table 1).

Table 1

By jurisdictions of settlement (1999 to June 2012 and July 2012 to April 2016)

Jurisdiction of settlement	Number of settlements ^a		Percentage of total
	1999 to June 2012	July 2012 to April 2016	
Australia		1	0.2
Brazil		2	0.4

⁹ John M. Hillebrecht and others, “DC Circuit curtails judicial exercise of supervisory powers over deferred prosecution agreements”, 20 April 2016. See also David Zaring, “Judges left out of deferred prosecution agreements”, *New York Times*, 29 April 2016.

Jurisdiction of settlement	Number of settlements ^a		Percentage of total
	1999 to June 2012	July 2012 to April 2016	
Canada	2	1	0.6
Costa Rica	1		0.2
Denmark	2		0.4
Germany	42	2	8.3
Greece	1		0.2
Italy	11		2.1
Japan	2		0.4
Kazakhstan	1		0.2
Lesotho	2		0.4
Netherlands	8		1.9
Nigeria	7		1.3
Norway	3	2	0.9
Switzerland	15	2	3.2
United Kingdom of Great Britain and Northern Ireland	19	5	4.5
United States of America	275	119	74.1
Total	391^b	134	100.0

Source: UNODC/StAR Initiative.

^a The number of settlements includes those for which the study was able to locate official government or court documents. For a comparison, see “Working Group on Bribery: 2014 data on enforcement of the Anti-Bribery Convention”, available at www.oecd.org.

^b *Left Out of the Bargain* also includes information on four settlements by the World Bank, where the underlying misconduct involved bribery of foreign public officials; the World Bank was also involved in settlements by Switzerland and the United Kingdom in the Alstom S.A. and MacMillan Publishing cases.

18. It also has to be noted that there is a lack of publically available information on the use of settlements in many jurisdictions. While there are media reports about settlements in France, Germany, Italy, Spain and Switzerland, more detailed information about particular cases is not readily publicly accessible, for example because of stringent privacy protections afforded to individual defendants in civil law jurisdictions or a lack of centralized publications on government agency websites.

19. *Left Out of the Bargain* recommended that countries whose officials were allegedly bribed should step up their own efforts to mount effective investigations and prosecutions against the providers and recipients of these bribes. This would greatly improve their prospects of recovering assets and bolster deterrence against active and passive corruption. Large and highly publicized criminal investigations and prosecutions by Brazil (in cases involving Petrobras¹⁰ and SBM Offshore), the United Republic of Tanzania (ongoing investigation of the Standard Bank case) and

¹⁰ Office of the Attorney General of Switzerland, “Petrobras affair: further USD 70 million of frozen assets to be unblocked and returned to Brazil”, 17 March 2016.

Uzbekistan (against individuals in cases involving VimpelCom) are some examples of affected jurisdictions taking enforcement actions. However, there was limited public availability of information regarding such investigations and prosecutions. For example, in 2015 the authorities of the Bahamas announced that they were cooperating with relevant authorities in the United States to investigate the bribery allegations made by Alstom S.A. against a former board member of the country's power company, Bahamas Electricity Corporation.¹¹ The conviction of the official in question was reported in the Bahamian media but no official court or government documents could be located at the time of writing. The case was therefore not included in the cases database.¹²

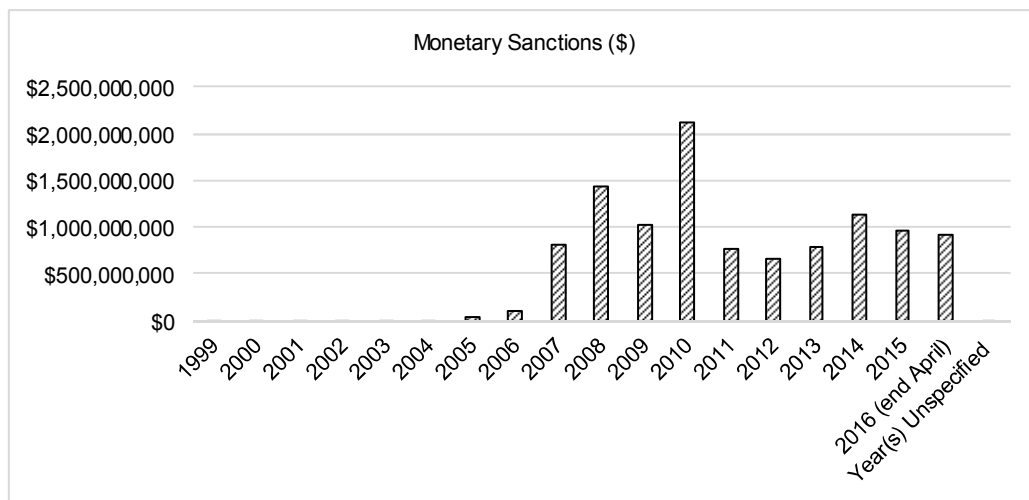
Volume of monetary sanctions imposed as part of settlements

20. In the period covered in *Left Out of the Bargain* — from 1999 to mid-2012 — monetary sanctions totalling \$6.9 billion were imposed.

21. In the period of approximately four years following the completion of the study — from mid-2012 to the end of April 2016 — slightly more than \$3.98 billion in monetary sanctions were imposed.

Figure II

Monetary sanctions imposed as part of settlements between 1999 and end of April 2016, by year



Source: UNODC/StAR Initiative.

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

¹¹ Bahamas, Office of the Attorney General, “Statement in response to Nassau Guardian editorial, Thursday 28 May 2015”, 3 June 2015.

¹² Lamech Johnson, “Updated: Ramsey convicted of multiple charges in Bec bribe case”, *Tribune* 242, 4 May 2016. The article indicated that the defendant had filed a constitutional motion which was set to be heard the following week. According to a media report, the hearing was postponed. See “Ramsey’s constitutional arguments begin”, *Bahama Journal*, 13 May 2016.

Type of monetary sanctions imposed as part of settlements

23. There are several types of monetary sanctions that typically seem to form the composite elements of settlements in different jurisdictions.¹³

24. “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: (a) criminal (conviction-based) confiscation; (b) non-conviction-based confiscation; and (c) 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 of victims.

25. “Disgorgement” is a civil (as opposed to criminal) remedy in common law jurisdictions. Unlike confiscation, this remedy is derived not from statute but from the courts’ equitable power to correct unjust inequality. Similar to confiscation, disgorgement is the forced surrender of illegally obtained profits.

26. “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.

27. “Restitution” is based on the principle that a person who has suffered loss as a result of a wrong committed against him/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.

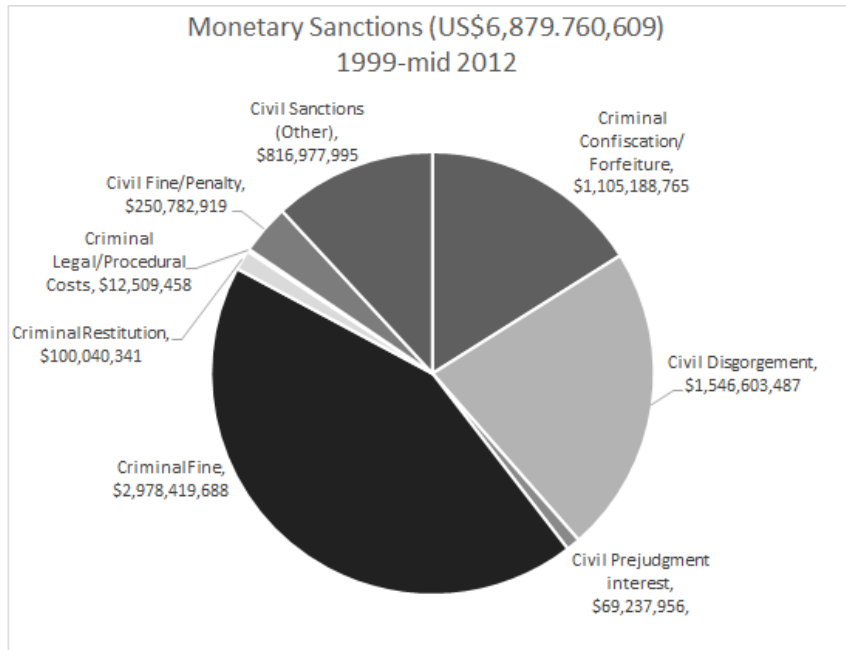
28. “Compensation” is similar to restitution, in that a court may issue a compensation order in a criminal case where a victim has been identified in the proceedings and has proved he or she suffered damage. The compensation order will often form part of the confiscation.

29. “Reparations” can take various forms and the word is used with various meanings. For purposes of the present document, reparations 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.

30. Figures III and IV provide a breakdown of the amounts of monetary sanctions by type within both periods: 1999 to mid-2012 and mid-2012 to the end of April 2016.

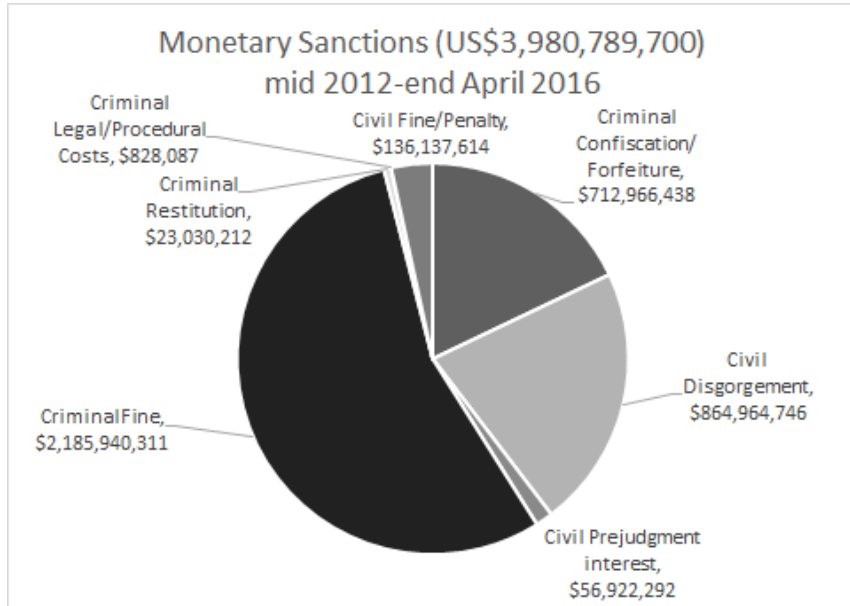
¹³ *Left Out of the Bargain*, figure B4.1.1.

Figure III
Monetary sanctions imposed between 1999 and mid-2012



Source: UNODC/StAR Initiative.

Figure IV
Monetary sanctions imposed between mid-2012 and the end of April 2016



Source: UNODC/StAR Initiative.

31. Notably, monetary sanctions that have been imposed with the purpose of depriving the alleged offender of illicitly acquired proceeds — such as criminal confiscations, civil disgorgement of profits and related prejudgment interest — constitute about \$4.35 billion, or 40.1 per cent, for the entire period 1999 to the end of April 2016.

Assets returned/ordered returned

32. *Left Out of the Bargain* looked at 395 settlement cases that took place between 1999 and mid-2012. These cases resulted in a total of \$6.9 billion in monetary sanctions. Approximately \$5.9 billion of that amount resulted from monetary sanctions imposed by a country other than the one whose public official had allegedly been bribed. Most of the monetary sanctions were imposed by the countries where the companies in question (and associated individual defendants) are headquartered or otherwise operate. Of the \$5.9 billion in sanctions imposed, only about \$197 million, or 3.3 per cent, was returned or ordered returned to the countries whose officials were allegedly bribed.¹⁴

33. In the period between mid-2012 and the end of April 2016, monetary sanctions totalling \$3,980,789,700 were imposed. Nearly all, or \$3,980,652,375, of this amount resulted from monetary sanctions imposed by a country other than the one whose public official had allegedly been bribed. Of this amount, only \$7,046,197 (or 0.18 per cent) was returned to the country whose officials had allegedly been bribed. The respective settlement — by the Serious Fraud Office of the United Kingdom in the Standard Bank case — involved compensation for the affected jurisdiction (United Republic of Tanzania) totalling \$6 million in compensation and \$1 million in interest.¹⁵ According to the Serious Fraud Office, the suspended charge related to a \$6 million payment by Stanbic Bank Tanzania — a former sister company of Standard Bank — in March 2013 to Enterprise Growth Market Advisors, a local partner in the United Republic of Tanzania. The Serious Fraud Office alleges that the payment was intended to induce members of the Government of the United Republic of Tanzania to show favour to Stanbic Bank Tanzania and Standard Bank's proposal for a \$600 million private placement to be carried out on behalf of the Government of the United Republic of Tanzania. The placement generated transaction fees of \$8.4 million, shared by Stanbic Bank Tanzania and Standard Bank.¹⁶

34. In addition, between 1999 and mid-2012, approximately \$556 million was returned or ordered returned in cases where the jurisdiction of enforcement and the

¹⁴ *Left Out of the Bargain*, 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; see Southwark Crown Court, *Between: Serious Fraud Office and Standard Bank Plc (Now known as ICBC Standard Bank Plc)*, Case No. U20150854.

¹⁶ The Serious Fraud Office indicated that "the money due to the Government of Tanzania will be returned in line with advice being received from the Department for International Development". The Department for International Development had played an important role in the return of reparations in the form of ex gratia payments to the United Republic of Tanzania which were part of the Serious Fraud Office 2010 settlement with BAE Systems Plc. See United Kingdom Department for Business, Innovation, and Skills, *Steps Taken to Implement and Enforce the OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions* (London, 2011); United Kingdom, Serious Fraud Office, "BAE fined in Tanzania defence contract case", press release, 21 December 2010; and Crown Court at Southwark, *Between: R and BAE Systems Plc*, Case No. S2010565 of 21 December 2010.

jurisdiction of the allegedly bribed foreign public officials were the same.¹⁷ In the period mid-2012 to the end of April 2016, the corresponding amount was \$137,325. More specifically, Brazil, which has been active in enforcement of cases related to Petrobras, agreed to settlements with various defendants. While table 2 records only \$137,325 in amounts returned, it should be noted that in March 2016, the Office of the Attorney General of Switzerland announced that his office had opened 60 Petrobras-related investigations, resulting in \$800 million in assets being frozen.¹⁸ In spring 2015 Switzerland returned to Brazil \$120 million in assets with the consent of the account holders and in March, the Office of the Attorney General announced plans to unblock and return a further \$70 million.¹⁹

35. In addition, in a case against the former executive of the Canada-based SNC-Lavalin company, the Office of the Attorney General of Switzerland concluded a settlement resulting in the return of \$13.3 million to the company, established as the victim of the corruption scheme.²⁰

Table 2

All detected cases where assets were returned or ordered returned between mid-2012 and the end of April 2016

<i>Case name</i>	<i>Jurisdiction of settlement</i>	<i>Jurisdiction of settlement/ enforcement agency</i>	<i>Jurisdiction of foreign public official(s)</i>	<i>Year of settlement</i>	<i>Monetary sanctions returned/ordered returned (United States dollars)</i>	<i>Monetary sanctions returned/ordered returned (Explanation)</i>
Standard Bank	United Kingdom of Great Britain and Northern Ireland	Serious Fraud Office	United Republic of Tanzania	2015	7 046 197	Compensation to the United Republic of Tanzania (\$6 million and \$1 million in interest) ^a
SBM Offshore NV/Bruno Chabas (Chief Executive Officer)	Brazil	Office of the Attorney General	N/A	2016	68 662.50	Prosecution by affected jurisdiction
SBM Offshore NV/Sietze Hephema (Superv. Board Member)	Brazil	Office of the Attorney General	N/A	2016	68 662.50	Prosecution by affected jurisdiction
SNC-Lavalin/Riadh Ben Aissa	Switzerland	Federal Prosecutor General	Bangladesh	2014	13 300 000	Return to SNC-Lavalin (Partie Plaignante)

^a This is the only detected case where assets were returned to the country whose officials had allegedly been bribed.

¹⁷ *Left Out of the Bargain*, table 4.1. Other asset returns in the form of a tax settlement and creation of a special fund to support integrity projects, both by Siemens AG, amounted to \$353.4 million (table 4.3).

¹⁸ Office of the Attorney General of Switzerland, “Petrobras affair: further USD 70 million of frozen assets to be unblocked and returned to Brazil”, 17 March 2016. Available at www.admin.ch/gov/en/start/documentation/media-releases.msg-id-61034.html.

¹⁹ Ibid.

²⁰ Office of the Attorney General of Switzerland, “Criminal proceedings against Alstom entities are brought to a close”, press release, 22 November 2011. Available at www.admin.ch/gov/en/start/dokumentation/medienmitteilungen.msg-id-42300.html.

36. Table 2 does not include two recent civil asset forfeiture actions by the United States Department of Justice with regard to illicit proceeds related to the VimpelCom/Unitel settlement for alleged bribery of a government official in Uzbekistan.²¹ One civil asset forfeiture action was filed against \$550 million in bribery proceeds located in Swiss bank accounts, and a second action seeks forfeiture of an additional \$300 million in proceeds of illegal bribes paid, or property involved in the laundering of those payments. The latter assets are restrained in Belgium, Ireland and Luxembourg. On 11 January 2016, the United States District Court for the Southern District of New York entered a partial default judgment against all potential claimants other than Uzbekistan. In its verified claim filed on 26 January 2016, Uzbekistan indicated that on 20 July 2015, the Tashkent Regional Criminal Court, an Uzbek court of competent jurisdiction, had issued a final criminal judgment confirming the rightful ownership of the assets in question by Uzbekistan.

Transparency of settlement agreements, negotiations/process

37. *Left Out of the Bargain* called for greater transparency in settlements. The study noted that the negotiation of settlements typically takes place between the authorities and alleged offenders, with little oversight by a judge and sometimes without any public hearing at the conclusion. The jurisdiction whose public officials were bribed and other victims generally have no involvement in the process. The report emphasized that once an agreement has been reached, it should be made public.

38. In the United States, in terms of publication of settlement agreements (plea agreements, deferred prosecution agreements and non-prosecution agreements), the United States Department of Justice and the Securities and Exchange Commission websites are quite comprehensive.²² The Fraud Section of the Department of Justice has a special publicly accessible area on its website devoted to the Foreign Corrupt Practices Act enforcement actions, which is searchable by parties' names and by year of the resolution. Some of the documents are published in English and Spanish, reflecting the geographical relevance and interest of a particular case. References and links to related civil asset forfeiture actions have also been added, making it possible to see the totality of the cases including the very important aspects involving confiscations of assets that may potentially be eligible for return to affected jurisdictions under article 57 of the Convention against Corruption.

²¹ United States Department of Justice, "VimpelCom Limited and Unitel LLC enter into global foreign bribery resolution of more than \$795 Million; United States seeks \$850 million forfeiture in corrupt proceeds of bribery scheme", 18 February 2016. The two civil asset forfeiture actions are: Southern District of New York, *United States of America v. Any and all assets held in account numbers 102162418400, 102162418260, and 102162419780 at Bank of New York Mellon SA/NV, Brussels, Belgium, on behalf of First Global Investments SPC Limited AAA Rate, et al*, Case No. 1:15-cv-05063 of 29 June 2015; and *United States of America v. all funds held in account number CH1408760000050335300 at Lombard Odier Darier Hentsch and Cie Bank, Switzerland, on Behalf of Takilant Limited, and Any Property Traceable Thereto et al*, Case No. 1:16-cv-01257 of 18 February 2016.

²² See Department of Justice, Foreign Corrupt Practices Act related enforcement actions, available at www.justice.gov; and Securities and Exchange Commission, "Enforcement actions; Foreign Corrupt Practices Act cases", available at www.sec.gov.

39. In the Netherlands, the Public Prosecution Service has undertaken significant enforcement actions in recent years and prominently provides links to the information on its home page. Case-related information is published in Dutch and English, including, for example, the statement of facts in the VimpelCom Limited case, which is useful in understanding the underlying conduct and scope of the cases.²³

40. The United Kingdom Serious Fraud Office does not maintain a separate section devoted to foreign bribery cases, but in recent years it has begun to provide case information on its website. Unlike the United States, which — for a low fee — has a publicly accessible electronic database of all federal court cases, documents filed therein, and notations on hearings and motions and other events,²⁴ only limited United Kingdom court records and judgments are available online.

41. 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 individuals.

42. Germany has provided data to the OECD 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

43. One of the recommendations in *Left Out of the Bargain* was that countries pursuing settlements should, wherever possible, transmit information spontaneously to other affected countries concerning basic facts of the case, in line with articles 46, paragraph 4, and 56 of the Convention against Corruption. The study also recommended that, where applicable, countries pursuing corruption cases could inform other potentially affected countries of the legal avenues available under their legal system to participate in the investigation and/or claim damages suffered as a result of the corruption. It was not possible to determine any significant developments in this regard. The one notable exception was the Serious Fraud Office Standard Bank case. In that case, information was proactively shared by the United Kingdom with authorities of the United Republic of Tanzania and the United States, a measure that was positively noted and commended by the judge presiding over the relevant legal proceedings.²⁵

44. The settlements in the VimpelCom Limited case involving the Netherlands and the United States are examples of extensive international cooperation in enforcement in the context of a foreign bribery case,²⁶ including jurisdictions — namely, the Netherlands and the United States — that extend beyond those undertaking enforcement actions against the involved companies. The United States

²³ See www.om.nl/algemeen/english.

²⁴ www.pacer.gov.

²⁵ *Between: Serious Fraud Office and Standard Bank Plc*, Case No. U20150854.

²⁶ The case is also an example of an enforcement action requiring extensive domestic cooperation among relevant agencies: in the United States, by the Department of Justice, Immigration and Customs Enforcement of the Department of Homeland Security Investigations and the Securities and Exchange Commission, and, notably in the more recent case, involvement of the Internal Revenue Service and its Criminal Investigation Division.

Department of Justice press release on the resolution of the criminal case noted that law enforcement colleagues within the Public Prosecution Service of the Netherlands, the Swedish Prosecution Authority, the Office of the Attorney General in Switzerland and the Corruption Prevention and Combating Bureau in Latvia provided significant cooperation and assistance in that matter. In addition, law enforcement colleagues in Belgium, France, Ireland, Luxembourg and the United Kingdom also provided valuable assistance.²⁷

45. Multijurisdictional cooperation has also been seen in the Petrobras-related cases. According to the Office of the Attorney General of Switzerland, at the March 2016 meeting between the Attorney General of Brazil, Rodrigo Janot, and the Attorney General of Switzerland, Michael Lauber, the two discussed the issue of creating a joint investigation team aimed at speeding up the proceedings being conducted by the two prosecution authorities. To date, the Office of the Attorney General has received reports of around 340 suspicious banking relations from the Money-Laundering Reporting Office in relation to the international corruption scandal involving the Brazilian company Petrobras, which is partially State-owned. In response, the Office of the Attorney General has since April 2014 opened some 60 investigations on suspicion of aggravated money-laundering (art. 305 bis, sect. 2 of the Swiss Criminal Code) and in numerous cases on suspicion of bribery of foreign public officials (art. 322 septies of the Swiss Criminal Code). The Office of the Attorney General has requested the handover of documents relating to more than 1,000 bank accounts from more than 40 banking institutions. In view of the complexity of the investigations, a task force made up of various specialists — from the Office of the Attorney General and supported by the Federal Office of Police — is conducting the proceedings. Two of the investigations opened by the Office of the Attorney General were taken over by the Brazilian authorities and have already led to charges in Brazil. The Office of the Attorney General plans to request the Brazilian authorities to take over other investigations that were opened in Switzerland.²⁸

46. While the above examples suggest an increased level of cooperation, including in cases possibly leading to settlements, it remains unclear how or whether spontaneous transmission of information to other affected countries is systematically taking place, apart from publication of information at the time of the resolution of the cases by jurisdictions such as the Netherlands, Norway, Switzerland, the United Kingdom and the United States.

III. Conclusions

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

²⁷ United States Department of Justice, “VimpelCom Limited and Unitel LLC enter into global foreign bribery resolution of more than \$795 million; United States seeks \$850 million forfeiture in corrupt proceeds of bribery scheme”, 18 February 2016.

²⁸ “Petrobras affair”.

48. While it seems that the overall number of settlements in foreign bribery cases is decreasing, this decrease appears to be caused primarily by a less frequent use of settlements by the authorities of the United States.

49. The approximately \$3.98 billion realized through monetary sanctions imposed as part of settlements between mid-2012 and the end of April 2016 remains substantial, and it appears that the value of individual settlements is increasing.

50. 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 respective cases. 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) was 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.

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

52. Although the data collected and analysed for the purpose of the present note do not suggest any significant developments in the use of settlements, they demonstrate that there is a need for more information on the use of settlements globally. While a number of developed countries have made the relevant information publically available, overall it remains difficult to make an accurate assessment of the use of settlements in many jurisdictions, especially in the case of developing countries.

53. While the findings of *Left Out of the Bargain* appear to remain largely relevant, a fully conclusive assessment of the use of settlements and other alternative mechanisms in concluding transnational corruption cases would require a more in-depth and comprehensive analysis.

54. The Working Group may wish to consider requesting States parties to provide to the Secretariat information on their legal frameworks and practice relevant to the use of settlements and other alternative mechanisms in concluding transnational corruption cases.

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

56. The Working Group 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.