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Open-ended Intergovernmental Working Group on Asset Recovery
Vienna, 6–10 September 2021
Item 4 (a) of the provisional agenda*
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 factors that influence the differences between the amounts realized in such mechanisms and the amounts returned to affected States and how such mechanisms could further promote the effective application of chapter V of the Convention

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

Note prepared by the Secretariat

Summary

The present note has been prepared pursuant to resolution 8/9 of the Conference of the States Parties (CoSP) to the United Nations Convention against Corruption (UNCAC) 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. The overview builds on data collected by the Secretariat in addition to the analysis conducted on this topic previously pursuant to earlier mandates of the Conference in this area.

* CAC/COSP/WG.2/2021/1.

I. Introduction

1. Since the 2013 study *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*[1] and the companion cases database by the Stolen Asset Recovery (StAR) Initiative of the United Nations Office on Drugs and Crime (UNODC) and the World Bank, 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, was to examine the impact of the increased use of settlements in foreign bribery cases on the implementation of the UNCAC. For that purpose, settlement cases between 1999 and mid-2012 were analysed.

2. The study observed that while UNCAC 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 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 UNCAC.

3. A note prepared by the Secretariat pursuant to the Conference's resolutions 6/2 and 6/3 (CAC/COSP/WG.2/2016/2) further found that asset returns continued to lag, with less than 1 per cent of the monetary sanctions imposed by enforcement countries ordered being returned to affected countries.[2]

4. In its resolution 8/9, entitled *Strengthening asset recovery to support the 2030 Agenda for Sustainable Development*, the CoSP to the UNCAC requested the Secretariat, and invited the StAR Initiative, to, *inter alia*, continue to maintain and update the 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 asked to provide regular updates to the Open-ended Intergovernmental Working Group on Asset Recovery; and 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.

5. In the same resolution, the Conference further directed the Open-ended Intergovernmental Working Group on Asset Recovery to, *inter alia*, 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.

6. At its special session on challenges and measures to prevent and combat corruption and strengthen international cooperation, held from 2 to 4 June 2021 in New York, the General Assembly adopted the political declaration "Our common commitment to effectively addressing challenges and implementing measures to prevent and combat corruption and strengthen international cooperation" that covers all the aspects of preventing and fighting corruption and advancing the anti-corruption agenda.[3] The political declaration emphasized in paragraph 50 that when employing

[1] Available at http://star.worldbank.org/star/sites/star/files/9781464800863.pdf. Further referred to as *Left Out of the Bargain* in the text.

[2] Available in different languages at www.unodc.org/unodc/en/corruption/WG-AssetRecovery/session10.html.

[3] Available at https://undocs.org/A/S-32/2/ADD.1.

alternative legal mechanisms and non-trial resolutions, including settlements, in corruption proceedings that have proceeds of crime for confiscation and return, Member States would strengthen their efforts to confiscate and return such assets in accordance with the Convention.

7. Pursuant to resolution 8/9, the present note has been prepared using the same research methodology as before, but with a focus on the proceeds of crime for confiscation and return. The cases database was updated from publicly available official sources.

8. Additional information was provided by 32 States parties in response to the request for information in a *note verbale* circulated by the Secretariat in February 2021 which included a questionnaire on settlements.[4] Twenty-four States parties responded 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 Brazil's "Acordo de leniência" (leniency agreement),[5] France's judicial public interest agreement (CJIP),[6] and Panama's "Alternative Procedures for the Resolution of Disputes."[7] Alternative legal mechanisms and non-trial resolutions, including settlements, can provide a legal basis for freezing/seizure, confiscation, and return of assets in 23 States parties. Most described confiscations in the context of criminal enforcement measures against an individual or legal person. Switzerland noted that "Under Swiss law, confiscation is not a personal measure (*in personam*), but a real measure (*in rem);* it must be ordered, regardless of the procedure chosen."[8]

9. Most of the States parties responded that information about cases of alternative legal mechanisms and non-trial resolutions, including settlements, is publicly available in their country. Their responses are discussed in the section on transparency below.

10. The States parties' responses on the challenges that they have faced and suggestions on good practices in settlements are discussed in the section on challenges and good practices. The summary of the responses is also made available for the attention of the Working Group.[9]

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[4] 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, Moldova, Morocco, Myanmar, Netherlands, New Zealand, Oman, Panama, Poland, Russian Federation, Saudi Arabia, Slovakia, Slovenia, Switzerland, and the United Kingdom.

[5] Created through Law nº 12.846/2013. Brazil response to UNODC Questionnaire (2021).

[6] Introduced into French law by Law n°2016-1691 of December 9, 2016 on transparency, the fight against corruption and the modernization of economic life (known as the Sapin 2 Law). France response to UNODC Questionnaire (2021).

[7] "[P]or medio de la cual se adopta el Código Procesal Penal de Panamá, incorpora, en el Título IV "Procedimientos Alternos de Solución de Conflictos", del Libro II "Actividad Procesal", en su artículo 220, la figura de los "acuerdos"; La Ley Nº 4 de viernes 17 de febrero de 2017 "Que reforma el Código Judicial, el Código Penal y el Código Procesal." Panama response to UNODC Questionnaire (2021).

[8] Switzerland further explained, "There are two types of confiscation under Swiss law: (1) the so-called "accessory" confiscation, which takes place in the context of criminal proceedings against one or more specific persons (art. 69 ff. CC [Criminal Code]). This confiscation can be ordered in the context of ordinary criminal proceedings as well as in the context of simplified proceedings (art. 360 al. 1 let. c CCP [Code of Criminal Procedure]) or in the context of a criminal order procedure (art. 353 al. 1 let. h CCP); (2) the so-called "independent" confiscation, which is aimed at situations in which this measure must be pronounced in a separate procedure because no criminal proceedings are initiated in Switzerland against specific persons (art. 376 ff CCP). In short, confiscation occurs in all cases. The distribution of the confiscated assets is then carried out in accordance with the federal law on confiscated assets, after deduction of what has been granted to the injured party in accordance with art. 73 CC."

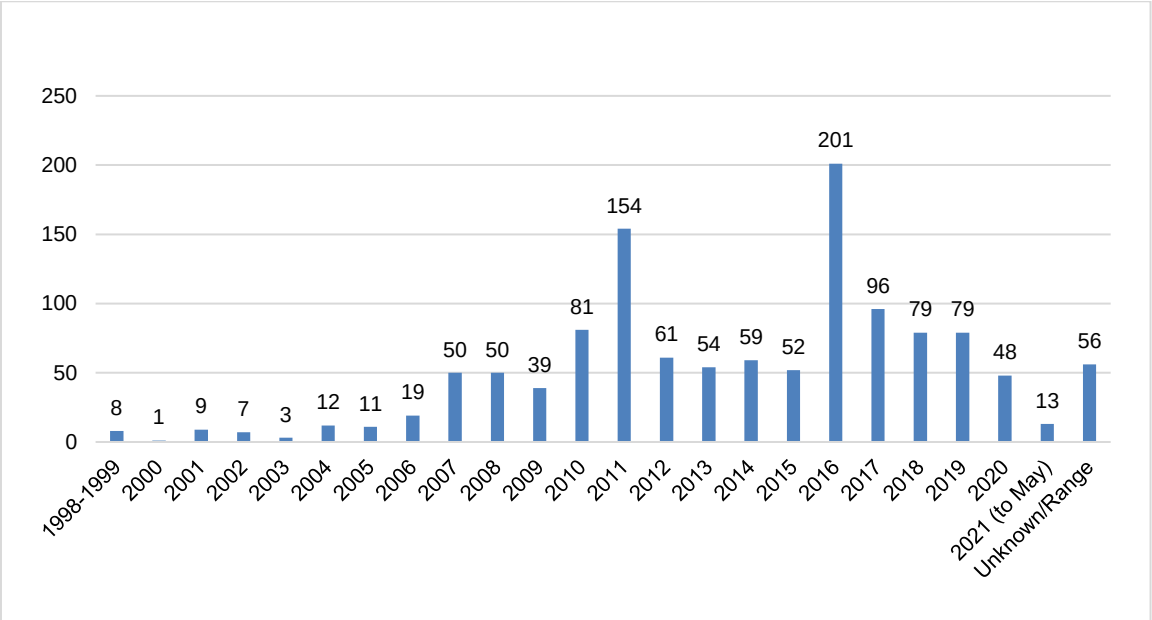
[9] Available at www.unodc.org/unodc/en/corruption/WG-AssetRecovery/session15.html.

11. Lastly, many respondents provided useful information on their settlement cases, which has been incorporated into the database that was updated pursuant to the Conference's mandate,[10] and used for the analysis in the present note.

II. Trends in the use of settlements

12. Table 1 clearly illustrates the steady growth in the use of settlements[11] to resolve foreign bribery and related cases.[12] *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 1999-May 2021. Of those, 1,242 (84.6 per cent) were resolved through settlements.[13]

Table 1
Number of settlement cases, by year



Source: UNODC (May 2021).

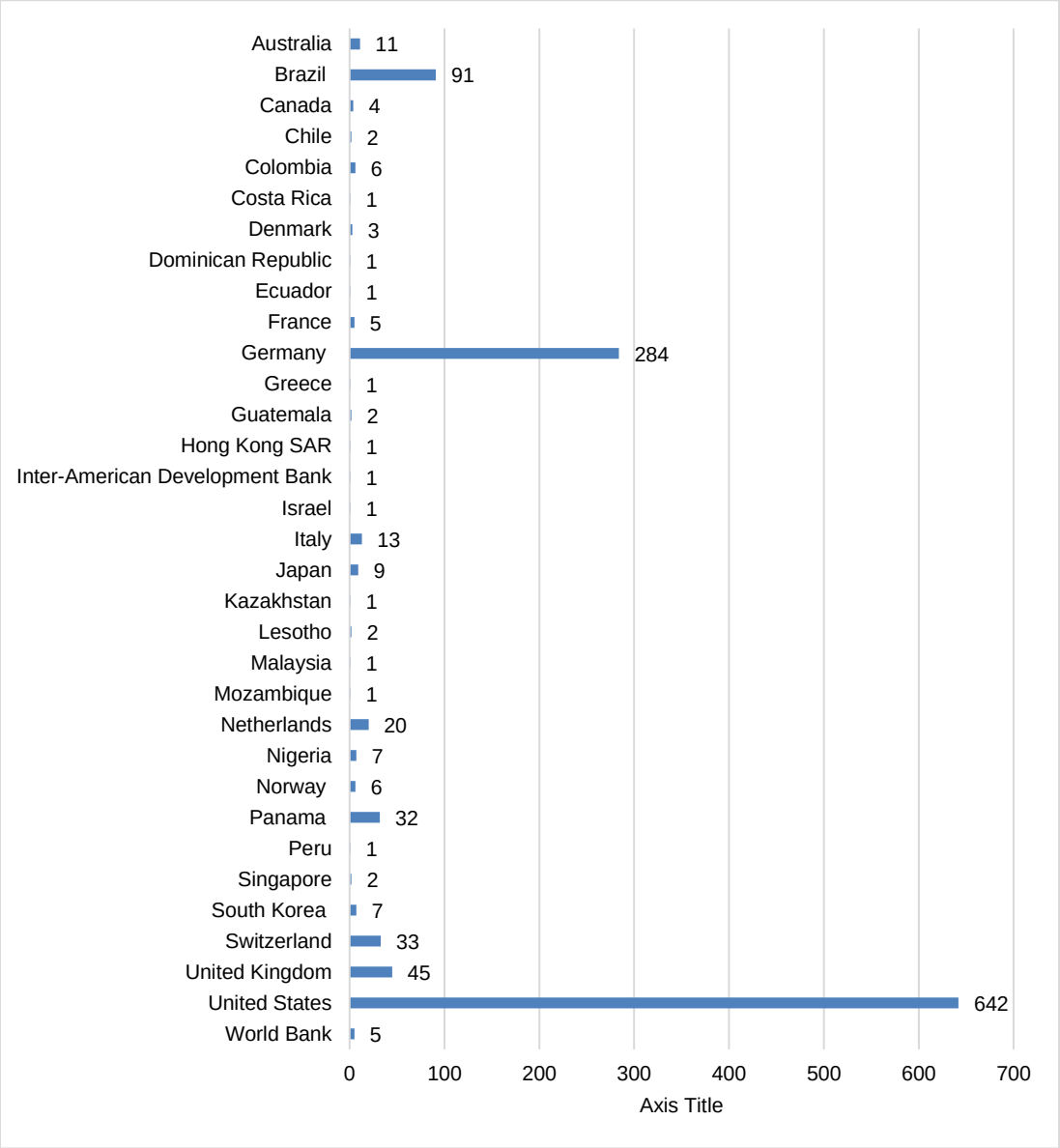
[10] Available at www.unodc.org/unodc/en/corruption/WG-AssetRecovery/session15.html

[11] For the definition of "settlement", see the corresponding section of note CAC/COSP/WG.2/2016/2.

[12] 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 by Brazil as part of Operação Lava Jato (Operation Car Wash) investigations.

[13] The database prepared for *Left Out of the Bargain* did not included non-settlements cases. The 1,468 cases in the current database include ongoing and concluded cases. The tally of settlements cases does not include ongoing cases with the exception of three Department of Justice cases in the United States of America where the individual defendants had pleaded guilty and were awaiting sentencing as of end-May 2021. Of the remaining cases, 97 were ongoing; 129 were where 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.

Table 2
Number of settlements, by jurisdictions and multilateral development banks (1999-May 2021)



Source: UNODC (May 2021).

13. Table 2 shows that Germany and the United States continue to be the most active in the enforcement of settlements. Brazil, France, Netherlands, Panama, Switzerland and the United Kingdom have also stepped up their enforcement efforts in recent years.

Enforcement by Affected Countries

14. *Left Out of the Bargain* had raised concern over the low level of enforcement by the affected countries, and recommended that they step up their own efforts to mount effective investigations and prosecutions against the providers and recipients of bribes, noting in part that this 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 Car Wash case, namely regarding the Brazilian company Odebrecht S.A."[14]

[14] In December 2020, the company changed its name to Novonor.

Brazil/Odebrecht S.A.

15. As part of its Operation Car Wash, Brazil greatly expanded its enforcement, resulting in nearly a hundred settlements with individuals and legal persons. The related cases also led to Brazil's participation in multijurisdictional settlements with other countries including the United States, Switzerland and the United Kingdom, resulting in the sharing of monetary sanctions ordered in such cases as Rolls-Royce PLC, Embraer S.A., J&F Investimentos S.A., Samsung Heavy Industries, and SBM Offshore NV.

16. Even amongst these large and complex cases, the Odebrecht S.A. cases stand out. As described by the US Department of Justice, the company engaged in a massive and unparalleled bribery and bid-rigging scheme for more than a decade, beginning as early as 2001. During that time, Odebrecht S.A. paid approximately US$ 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 off-shore bank accounts.[15]

17. 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 Brazil's Federal Prosecution Service, the US Department of Justice and the Swiss Attorney General's Office and agreed, in part, to pay at least US$ 3.5 billion in monetary sanctions. Colombia, Dominican Republic, Ecuador, Guatemala, Panama, and Peru also entered into settlement agreements with Odebrecht S.A., that appear to have resulted in asset returns.[16] The company's resolution with the Inter-American Development Bank (IDB) included a US$50 million contribution by the company to non-governmental organizations and charities serving vulnerable communities in IDB member countries.[17]

18. 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 the section on Monetary Sanctions & Enforcement by Affected Jurisdictions.

Other important developments

19. Role of International Development Banks: Settlements undertaken by the World Bank and the Inter-American Development Bank 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.

20. Change in nature of cases: Whether it be the number of documents involved, or the scope, many of the cases were sizeable, both in scale and complexity. The

[15] US Department of Justice Press Release, "Odebrecht and Braskem Plead Guilty and Agree to Pay At Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History," 21 December 2016.

[16] Ibid.; Brazil Ministerio Publico Federal, "Brazilian Federal Prosecution Service (MPF) enters into leniency agreements with Odebrecht and Braskem"; Superintendencia Industria y Comercio (SIC), "Colombia's sic levies sanctions of $84.4 million usd on Odebrecht and other players for antitrust in "ruta del sol II," 28 December 2020 on website of SIC (the announcement was posted in English and Spanish; Dominican Republic, Procuraduria General de la Republica press release, "PGR revela detalles acuerdo con Odebrecht; garantiza continuidad de investigaciones para identificar sobornados," 2 February 2017; Guatemala CICIG Press Release, "Condena en caso Odebrecht," 25 October 2018; Panama Response to UNODC Questionnaire (March 2021); Procuraduria General del Estado Press Release, "Estado peruano cobra s/ 22 milones por segunda cuota de reparacion civil de la empresa Odebrecht," 30 December 2020; Novonor company (formerly Odebrecht) press release, "Peruvian justice system approves Odebrecht's collaboration agreement," 19 June 2019.

[17] Inter-American Development Bank News Release, "Odebrecht Group Reaches Settlement Agreement with IDB Group Resulting in Sanctions," 4 September 2019.

UK Serious Fraud Office (SFO) 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 (AI) technologies by the SFO in that case is discussed in the section on Challenges and Good Practices.

21. Increased international cooperation: Due to their transnational nature, the cases required assistance and cooperation among authorities in different countries. As an example, the case of VimpelCom Limited and other companies and assets related to Gulnara Karimova, former public official and the daughter of the former president of Uzbekistan, 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 US Department of Justice acknowledged significant cooperation and assistance by law enforcement colleagues within the Dutch Public Prosecution Service, the Swedish Prosecution Authority, the Office of the Attorney General in Switzerland, the Corruption Prevention and Combating Bureau in Latvia, as well as Belgium, France, Ireland, Luxembourg and the United Kingdom.[18]

22. The SFO investigation into the Alstom S.A. related cases "involved cooperation with more than 30 countries including France, Canada, Hungary, Denmark, Austria, Slovakia, Czech Republic, Lichtenstein, Cyprus, Singapore, the Seychelles, India, Sweden, Lithuania, Switzerland, and Tunisia."[19]

23. Settlements with individuals: Among the cases of individuals, the largest confiscation ordered was against Alejandro Andrade Cedeno, former National Treasurer of Venezuela (2007–2011) who pleaded guilty in the United States to a money-laundering conspiracy and agreed to forfeit US$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 Swiss and US financial institutions.[20]

24. 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 Anti-Money Laundering/Combating the Financing of Terrorism (AML/CFT) safeguards have been included in the updated cases database. For example, in 2018, the ING Bank N.V.[21] entered into a settlement with the Netherlands Public Prosecution Service (NPPS) which accused the bank of violating the Anti-Money Laundering and Counter Terrorism Financing Act "for many years and on a structural basis. This took place in such a way that the bank is also accused of culpable money laundering: the bank failed to prevent bank accounts held by ING clients in the Netherlands between 2010 and 2016 from being used to launder hundreds of millions of euros."[22] One client example cited by the NPPS was "an international telecom provider that transferred bribes worth tens of millions of dollars via its bank accounts with ING NL to a company which was owned by the daughter of the then president of Uzbekistan."[23]

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[18] US Department of Justice Press Release, "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.

[19] UK Serious Fraud Office, "Five convictions in SFO's Alstom investigation into bribery & corruption to secure EUR 25 million of contracts," 19 December 2018.

[20] US v. Andrade Cedeno, 17-cr-80242 (SDFL), Final Order of Forfeiture (5 August 2019); Court Docket Report as of 2 May 2021. US Department of Justice Press Release, "Former Venezuelan National Treasurer Sentenced to 10 Years in Prison for Money Laundering Conspiracy Involving Over $1 Billion in Bribes," 27 November 2018.

[21] ING Bank: Netherlands Public Prosecution Service Press Release, "ING pays 775 million due to serious shortcomings in money laundering prevention," 9 April 2018; Netherlands Public Prosecution Service National Office and National Office for Serious Fraud, Environmental Crime and Asset Confiscation, Settlement Agreement Houston (English Translation) with ING Bank N.V.

[22] Netherlands Public Prosecution Service Press Release, "ING pays 775 million due to serious shortcomings in money laundering prevention," 9 April 2018.

[23] Ibid., which also noted, "ING NL reported the unusual transactions to the FIU far too late. In

25. Most recently, in May 2021, Norway's Finanstilsynet, the country's financial supervisory authority, announced that during its 2020 inspection of the DNB Bank, the authority had "also investigated the bank's handling of its customer relationship with companies in the Samherji Group,"[24] which had been under investigation by Icelandic authorities for alleged bribery of public officials in Namibia. The Finanstilsynet concluded that "[t]he offences uncovered by Finanstilsynet in connection with the Samherji case mainly relate to matters that are time-barred or occurred under the former Anti-Money Laundering Act, in which there was no legal basis for imposing administrative sanctions."[25] However, the inspection report led to findings of serious breaches in the bank's compliance with the Anti-Money Laundering Act and imposed a fine of US$48,100,000.[26]

26. Designated non-financial businesses and professions and misuse of shell companies: It is beyond the scope of this note to delve into the involvement of other professional intermediaries, such as lawyers, accountants, trust services and company service providers and others who work in what is referred to as designated non-financial businesses and professions (DNFBPs). However, the lack of detail in the settlement agreements regarding the involvement of and enforcement against DNFBPs, 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 the money laundering schemes to conceal the origin and/or destination of proceeds of crime.

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

III. Settlements and transparency

28. *Left Out of the Bargain* noted the lack of publicly available information on the use of settlements in many jurisdictions. Nearly a decade later, information about settlements cases is publicly available in about two-thirds of the States parties that responded to the 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.

29. 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 US federal court cases, with the ability 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.

30. Brazil, Ecuador, France, Colombia, Dominican Republic, 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

addition, ING NL did not sufficiently investigate the identity of the actual owner of the company."

[24] Norway, Finanstilsynet, "Inspection report – DNB Bank ASA," published 3 May 2021.

[25] Iceland had noted that it had commenced investigation in 2019 into the "Namibia Case" involving alleged bribery paid by the Samherji Group. See Iceland OECD Phase 4 Report on Implementation of the OECD Anti-Bribery Convention (adopted 10 December 2020), at 10. See also, Samherji company press release, "No surprises in legal proceedings in Namibia," 5 February 2021.

[26] These cases involving financial institutions are distinguished from that of Société Générale which entered into a Deferred Prosecution Agreement with the US Department of Justice and in France, a Convention judiciaire d'intérêt public with the Parquet National Financier. See US Department of Justice Press Release, "Société Générale S.A. Agrees to Pay $860 Million in Criminal Penalties for Bribing Gaddafi-Era Libyan Officials and Manipulating LIBOR Rate," 4 June 2018. The CJIP can be downloaded at the website of Le Tribunal de Paris, at tribunal-de-paris.justice.fr (publications).

the legal basis for the settlements as well as the policy goals of accountability and efficiency and efficacy underlying the use of settlement mechanisms.[27]

31. Relatively less information about cases is publicly available in civil law jurisdictions such as Germany, Italy and Kazakhstan due to stringent privacy protections afforded to individual defendants. However, the Swiss Office of the Attorney General's efforts to make more information publicly available about the progress and resolution of cases, particularly in which there are UNCAC article 57 asset recovery implications, are notable.[28]

IV. Monetary Sanctions

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

"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 for victims.

"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' equitable power to correct unjust inequality. Similar to confiscation, disgorgement is the forced surrender of illegally obtained profits. In recent years, the UK SFO and US Department of Justice have imposed disgorgement in their settlements with Legal Persons.

"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.

"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.

"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. But as noted below with regard to the Gunvor case example in Switzerland, compensation can serve as a substitute for confiscation.

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

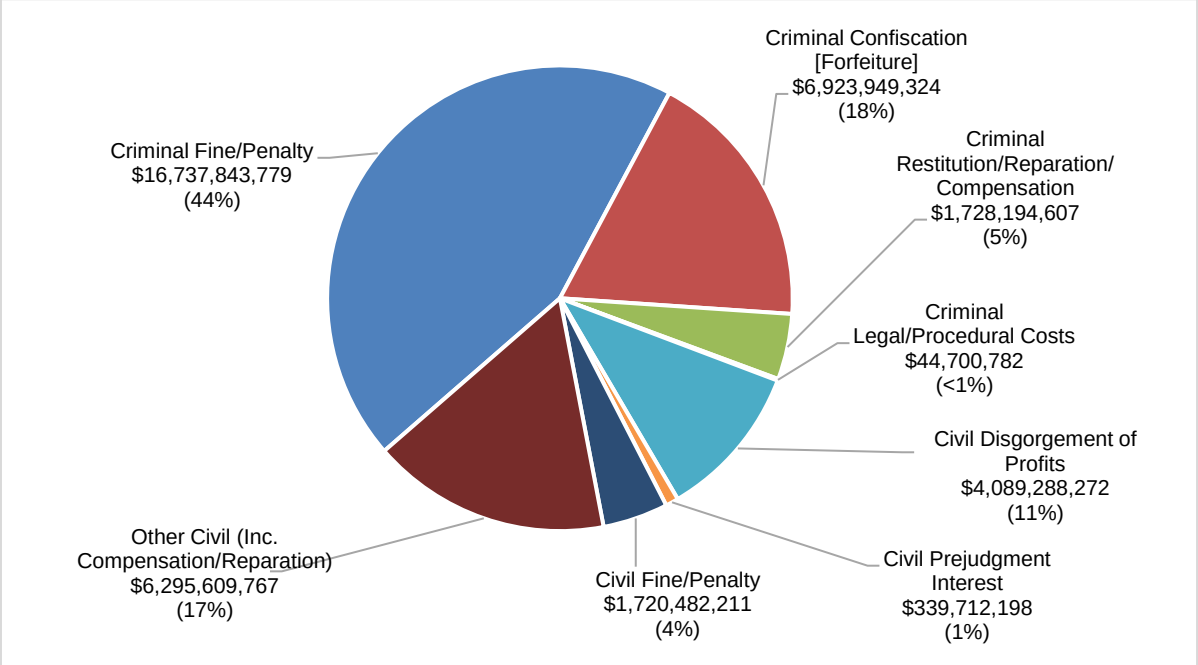
33. *Left Out of the Bargain* found that a total of US$6.9 billion in monetary sanctions had been imposed in settlements from 1999-mid 2012. By mid-2016, monetary sanctions totalled nearly US$10.9 billion.

[27] Brazil: Acordos de Leniências Homologados pela 5ª CCR (mpf.mp.br) and **Error! Hyperlink reference not valid.**; France: Accueil | Tribunal de Paris (justice.fr); United Kingdom SFO at Our cases – Serious Fraud Office (sfo.gov.uk).

[28] Swiss Office of the Attorney General Press Releases at Press releases (bundesanwaltschaft.ch) and Annual Reports at OAG annual reports (bundesanwaltschaft.ch).

34. As of May 2021, total monetary sanctions imposed was about US$37.88 billion,[29] reflecting both the increase in enforcement and large size of monetary sanctions, including those exceeding US$1 billion in settlements with companies in very large and complex cases, including Airbus SE[30] and Goldman Sachs Group.[31] The largest settlements have not been limited to settlements with companies. As noted above, Alejandro Andrade Cedeno was ordered to forfeit US$1 billion.[32]

Figure I
Monetary sanctions, by type in US$ (1999-May 2021)



Source: UNODC (May 2021)

35. It should be noted that the amounts in Figure I 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/reparation payment of US$184 million, with the first payment of US$30 million due at the signing of the agreement and the remainder payable annually over an eight-year period.[33] Brazil's agreement with SBM Offshore provided for payments in three instalments.[34]

[29] Information provided did not always include precise data on monetary sanctions. When, for example, a range in criminal penalty was given, the lowest amount was entered into the database.

[30] Judicial Public Interest Agreement between the French National Prosecutor's Office and Airbus S.E., Ref. PNF-16 159 000 839 (available in English and French); US v. Airbus SE, 20-cr-21 (DDC), Deferred Prosecution Agreement filed 31 January 2020; US Department of Justice Press Release, "Airbus Agrees to Pay over $3.9 Billion in Global Penalties to Resolve Foreign Bribery and ITAR Case," 31 January 2020; UK Serious Fraud Office Press Release, "SFO enters €991m Deferred Prosecution Agreement with Airbus as part of a €3.6bn global resolution," 31 January 2020.

[31] US Department of Justice Press Release, "Goldman Sachs Charged in Foreign Bribery Case and Agrees to Pay over $2.9 Billion," 22 October 2020; Goldman Sachs Press Release, "Goldman Sachs Announcement on Agreement with the Government of Malaysia," 24 July 2020.

[32] US v. Alejandro Andrade Cedeno, Case No. 17-cr-80242 (SDFL), Judgement filed November 18, 2018 and Final Order of Forfeiture filed 5 August 2019.

[33] Dominican Republic Procuraduria General de la Republica (PGR) press release, "PGR revela detalles acuerdo con Odebrecht; garantiza continuidad de investigaciones para identificar sobornados," 2 February 2017.

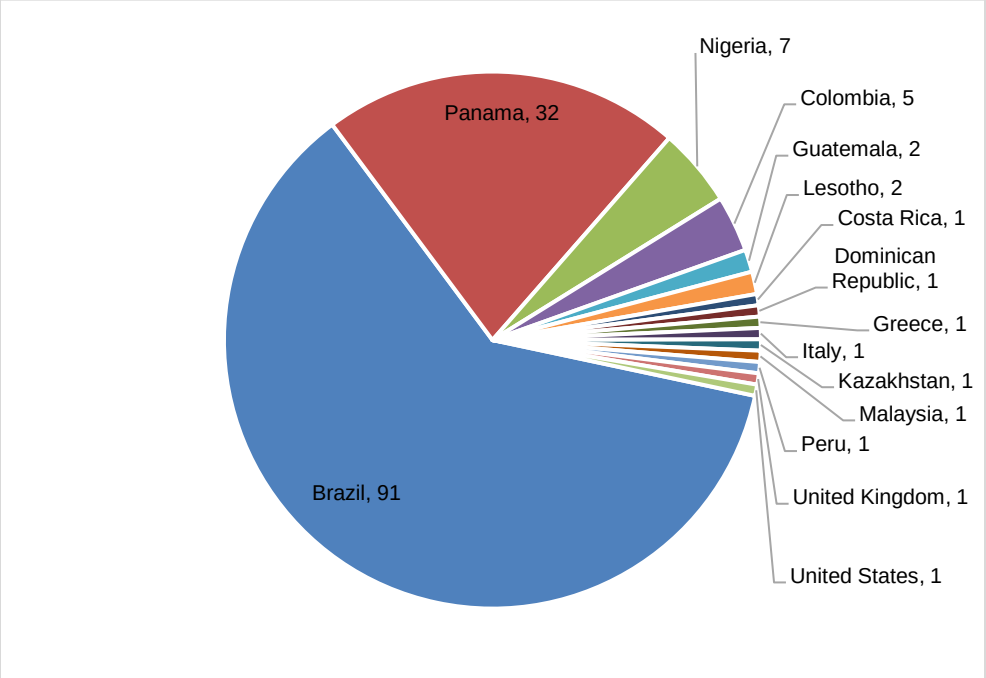
[34] "The terms for final settlement negotiated between the Parties are as follows: cash payment by SBM Offshore totalling US$162.8 million, of which US$149.2 million will go to Petrobras,

36. The totals also include monetary sanctions ordered in cases of individuals where the courts noted the defendants' inability to pay the ordered confiscation (forfeiture) or restitution.[35]

Monetary sanctions resulting from enforcement by affected countries

37. As of May 2021, about US$11.58 billion of the US$37.88 billion total monetary sanctions ordered had been monetary sanctions resulting from 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, their 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 II below shows the enforcement by number of cases, and Table 3 by the amounts of sanctions imposed by country.[36]

Figure II
Enforcement by affected countries, by number of cases (1999-May 2021)

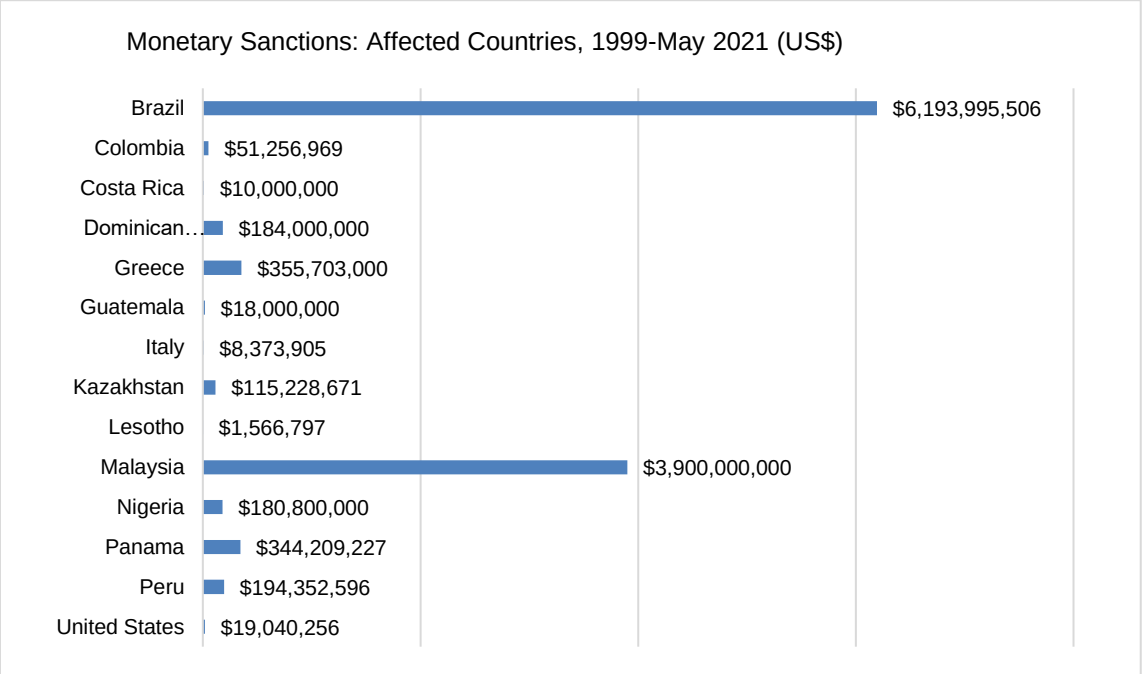


US$6.8 million to the MPF and US$6.8 million to the Council of Control of Financial Activities (Conselho de Controle de Atividades Financeiras – "COAF"), for the implementation of units for massive electronic process of information and other instruments to be used in the prevention and combat against corruption by the MPF and the COAF. This amount will be paid in three instalments. The first instalment of US$142.8 million will be payable as of the effective date of the Settlement Agreement. The two further instalments of US$10 million each will be due respectively one and two years following the effective date of the Settlement Agreement; and a reduction of 95 per cent in future performance bonus payments related to FPSOs Cidade de Anchieta and Capixaba lease and operate contracts, representing a nominal value of approximately US$179 million over the period 2016 to 2030, or a present value for SBM Offshore of approximately US$112 million."

[35] In a very small number of cases, the authorities stated that no monetary sanction was being imposed because of the defendant's inability to pay. For example, US v. Rama, Case No. 15-cr-143 (EDVA), Judgment filed 15 October 2015.

[36] Details of the monetary sanction amount in the one case in the UK are unknown, and as such, UK does not appear in the table.

Table 3:
Monetary sanctions resulting from enforcement by affected countries, in US$ (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 conspiring to violate the Foreign Corrupt Practices Act in connection with a scheme to pay over US$1 billion in bribes to officials in Malaysia and Abu Dhabi, to obtain business, including underwriting approximately US$6.5 billion in three bond deals for 1Malaysia Development Bhd (1MDB). Under its agreement with the US Department of Justice, "Goldman will pay a criminal penalty and disgorgement of over US$2.9 billion [to the United States]. Goldman also has reached separate parallel resolutions with foreign authorities in the United Kingdom, Singapore, Malaysia, and elsewhere, along with domestic authorities in the United States. The department will credit over US$1.6 billion in payments with respect to those resolutions."[37]

According to Goldman Sachs, the company's US$3.9 billion agreement with the Government of Malaysia included 1) payment to the Government of Malaysia of US$2.5 billion and 2) guarantee that the Government of Malaysia receives at least US$1.4 billion in proceeds from assets related to 1MDB seized by government authorities around the world. The company has also agreed to pay the US Securities and Exchange Commission US $606.3 million in disgorgement which was deemed to be satisfied by payment previously made to Malaysian Government and 1MDB pursuant to Goldman Sachs' settlement with the Malaysian Government.[38]

[37] US Department of Justice Press Release, "Goldman Sachs Charged in Foreign Bribery Case and Agrees to Pay Over $2.9 Billion," 22 October 2020.

[38] Goldman Sachs Press Release, "Goldman Sachs Announcement on Agreement with Government of Malaysia," 24 July 2020. This illustrates the difficulty in parsing together the interconnection between the settlements by multiple jurisdictions in a related case solely through public statements and sources of information.

V. Confiscations of proceeds of crime

38. Article 2 of UNCAC (Use of Terms) provides that both “Proceeds of crime” and “Confiscation” 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;

37. Article 31 of UNCAC outlines obligations of States parties with regard the freezing, seizure and confiscation of proceeds of crime, including:

- 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 (art.31(4)).
- 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 (art.31(5)).
- 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 (art.31(6)).

39. According to research by UNODC for this note and as shown in Table 4, from 1999 to May 2021, enforcement countries had ordered about US$6.78 billion in confiscations of proceeds of crime.

Table 4
Confiscation of proceeds of crime in enforcement countries (1999-May 2021)

Enforcement Country	Amount (US$)
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	$1,140,899,388
United States	$2,306,290,020
Total:	**$6,786,487,034**

Source: UNODC (May 2021).

40. 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, its actions seem to constitute de facto confiscations.

41. For example, in 2019, the Swiss Office of the Attorney General ordered “Gunvor Ltd. to pay CHF 90 million (US$99,793,800) as compensation, because under Art. 71

para 1 SCC [Swiss Criminal Code], compensation is payable if there are no assets directly available for forfeiture."[39] In this case, Switzerland also stated that the CHF 90 million "corresponds to the total profit that Gunvor made from the business in question in the Republic of Congo and Ivory Coast."[40]

42. Against the backdrop, as shown above, UNCAC article 2 defines "proceeds of crime" which could be subject to confiscation as "any property derived from or obtained, directly or indirectly, through the commission of an offence"; in addition, art.31(6) specifically stipulates that income or other benefits derived from the proceeds of criminal offences shall be subject to confiscation.

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

44. Some types of monetary sanctions imposed by the United Kingdom, Germany and the United States may deserve an additional discussion on their nature within the broad use of the terms "proceeds" and "confiscation" under the UNCAC.

45. United Kingdom – SFO: During the period 1999-mid 2021, the United Kingdom ordered confiscation as a part of cases resolved through the guilty plea by legal persons and individuals. However, since 2015, the SFO has concluded Deferred Prosecution Agreements (DPAs) with seven legal persons that have resulted in disgorgements totalling US$1,109,155,830.[41] Prior to DPA's introduction, 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 recovery of US$62,378,717. The question is whether the disgorgement ordered as part of the DPA and the sanctions under the Civil Recovery Order fall under the UNCAC's definitions of confiscation and proceeds of crime.

46. Germany and Confiscations Imposed on Legal Persons under the Administrative Offences Act (OWiG): As of May 2021, confiscations had been ordered by Germany's public prosecutors in 16 cases of legal persons in the amount totalling about US$1.33 billion.[42] The cases were resolved under Section 29 (a), Section 30 and Section 130 of the Administrative Offences Act (OWiG).

47. 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. […] In addition, German prosecutors in some Länder (constituent states of the Federal Republic) have also been using Forfeiture Orders under section 29a OWiG as non-trial resolutions with 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 (section 130 OWiG) but does not establish corporate liability. These resolutions hence allow to recover illicit gains from companies while not holding them liable (and without imposing a regulatory fine)."[43]

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[39] Office of the Attorney General of Switzerland Press Release, "Commodities trader Gunvor held criminally liable for acts of corruption," 17 October 2019.

[40] Ibid.

[41] UNODC (May 2021).

[42] Note that the amount of forfeiture in one of the cases was not specified. Implementing the OECD Anti-Bribery Convention, Germany Phase 4 Report (adopted 14 June 2018), Annex 1: Germany's Foreign Bribery Enforcement Actions, at 89.

[43] OECD, Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention (2019), Box 4. Declination/NPA-like resolutions in civil matters: Forfeiture Order in Germany at 48.

48. US Department of Justice: confiscation and disgorgement: Germany's practice of prosecutors employing an administrative law to resolve criminal cases may be distinguished from the US where in nearly all foreign bribery cases, the Department of Justice (DOJ) and its prosecutors resolve criminal charges by using criminal statutes as a legal basis while the Securities and Exchange Commission resolves civil/administrative charges through civil/administrative proceedings.

49. Interestingly, the DOJ's settlement agreement with Walmart's Brazilian subsidiary WMT Brasilia S.a.r.l included a confiscation/forfeiture of profits while disgorgement of profits was imposed in its settlements with the Insurance Corporation of Barbados Limited and HMT LLC against whom there was no parallel SEC enforcement proceeding as they were not publicly listed companies.[44]

VI. Asset recovery and asset return

50. As noted above, as of May 2021, about US$37.88 billion in monetary sanctions have been imposed in settlements of foreign bribery and related cases. About US$11.58 billion are monetary sanctions resulting from settlements undertaken by the affected countries (Table 3), including Brazil and Malaysia as part of multijurisdictional resolutions.[45] Nearly US$6.8 billion are confiscations ordered by enforcement countries (Table 4).

51. As shown in Table 5, since the 2016 Note, nearly US$283 million in assets have been ordered returned to the affected countries from enforcement countries and the IDB.

Table 5
Assets returned/ordered returned by enforcement countries (mid 2016–May 2021)[46]

Case Name	Enforcement Countries (Organization)	Country of Foreign Public Official(s)	Year of Settlement	Legal Form of Settlement	Monetary Sanction (Type)	Monetary Sanctions Returned/ Ordered Returned (US$)
Uzbekistan/ Real Properties	France	Uzbekistan	2019	*La Comparution Immediate sur Reconnaissance Préalable de Culpabilité*	Criminal Forfeiture	$71,148,360
Odebrecht S.A./CNO S.A. (subsidiary)	Inter-American Development Bank	Venezuela, Brazil	2019	Negotiated Resolution Agreement	Administrative Process (Contributions to NGOs and Charities)	$50,000,000
Relative of Gulnara Karimova	Switzerland	Uzbekistan	2018	Summary Punishment Order	Forfeiture	$144,146,600

[44] US Department of Justice Letter of Declination re: Insurance Corporation of Barbados Limited, 23 August 2018 and Letter of Declination re: HMT LLC, September 29, 2016.

[45] See above, discussion of Odebrecht S.A. and Goldman Sachs cases. Another example is J&F Investimentos S.A., which agreed to pay total fine of US$256,497,026 as part of its resolution with the US DOJ and in which the DOJ agreed to offset half of the total fine (US$128,248,513) for penalties company agreed to pay Brazilian government as part of the company's Leniency Agreement with Brazil.US v. J&F Investimentos S.A., 20-cr-365 (EDNY), Judgment filed 15 October 2020; US Department of Justice Press Release, "J&F Investimentos S.A. Pleads Guilty and Agrees to Pay Over $256 Million to Resolve Criminal Foreign Bribery Case,"14 October 2020; Brazil Ministerio Publico Federal, Acordo de Leniencia, J&F Investimentos S.A. dated 5 June 2017.

[46] Note that the monetary sanctions "returned" to affected countries as part of their participation in multijurisdictional settlements have not been included in this table. Those amounts have been reflected in Table 3: Monetary sanctions resulting from enforcement by affected countries, in US$ (1999–May 2021)

Case Name	Enforcement Countries (Organization)	Country of Foreign Public Official(s)	Year of Settlement	Legal Form of Settlement	Monetary Sanction (Type)	Monetary Sanctions Returned/ Ordered Returned (US$)
Servicios di Telecomunicacion di Aruba N.V. (“Setar”)/Egbert Yvan Ferdinand Koolman (PEP)	United States	Aruba	2018	Guilty Plea	Criminal Restitution	$1,308,500
Servicios di Telecomunicacion di Aruba N.V. (“Setar”)/ Lawrence Parker	United States	Aruba	2017	Guilty Plea	Criminal Restitution	$701,750
Alstom Power Ltd.	United Kingdom	Lithuania	2016	Guilty Plea	Compensation	$15,504,719
					Total:	**$282,809,929**

Source: UNODC (May 2021)

52. UNCAC article 53 on measures for direct recovery of property requires each State party, in accordance with its domestic law, to: “(b) take such measures as may be necessary to permit its courts to order those who have committed offences established in accordance with this Convention to pay compensation or damages to another State party that has been harmed by such offences.”

53. Article 57.3(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.

54. In the US v. Koolman case, it was essential for the Aruban government to be recognized as a victim entitled to restitution by a court in the United States. Egbert Yvan Ferdinand Koolman, a former official of Servicio di Telecommunicacion di Aruba NV (SETAR) and a Dutch citizen residing in Miami, was ordered by the US District Court for the Southern District of Florida to pay US$1,308,500 in restitution to SETAR which the Court had deemed the victim in the case. However, the Court also noted that Mr. Koolman did not have the ability to pay as he had already spent his bribery proceeds on, among other things, gambling and traveling, sponsoring a soccer league and paying for his father’s medical and later, funeral expenses.[47]

VII. Observations on challenges and good practices

55. Following challenges and good practices could be observed from the analysed information:

Growing complexity of cases, costs, and use of technology

56. Subsequent to the 2017 Rolls-Royce PLC’s Deferred Prosecution Agreement with the UK Serious Fraud Office, the SFO announced that this was the first case in which it had used new Artificial Intelligence (AI) technologies to analyse more than an estimated 30 million documents provided by the company for material potentially covered by Legal Professional Privilege, and that this technology would be available in all future cases. 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 “[p]reviously, only independent barristers were used to comb through thousands of complex

[47] US v. Koolman, 18-cr-20276 (SDFL), Judgment filed June 29, 2018; Transcript of sentencing proceedings,” June 27, 2018. SETAR had filed a civil suit against Mr. Koolman. SETAR N.V. v. Koolman, et al, 17-cv-20835 (SDFL), Civil Complaint filed 3 March 2017.

documents to identify evidence that could or couldn't be seen by SFO investigators prior to them even beginning to sift through the documents themselves."[48] A new AI-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 SFO's settlements, including £13 million in the Rolls-Royce case.[49]

57. As cases grow in size and complexity, countries will have to explore ways to fund their investigations, including investments in new technologies. Brazil's Leniency Agreement with SBM Offshore company provided for $ 6.8 million in monetary sanctions to the Council of Control of Financial Activities (Conselho de Controle de Atividades Financeiras – "COAF"), for the implementation of units for massive electronic process of information and other instruments to be used in the prevention and combat against corruption by the MPF and the COAF.

58. Financial resources for investigations also may be available through such mechanisms as the US Department of Justice Asset Forfeiture Fund, which provides for Equitable Sharing Payment. These are amounts paid to state and local law enforcement agencies and foreign governments for assistance in forfeiture cases. The DOJ notes that "Equitable sharing payments must reflect the degree of direct participation in law enforcement efforts resulting in forfeiture."[50]

International cooperation

59. While the settlements cases attest to an increase in international cooperation,[51] Saudi Arabia has stated that "One of the most significant challenges lies 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, hinders and affects the process of reclaiming and returning the stolen public funds from abroad." Saudi Arabia recommended "establishing clear and simple legal mechanisms for settlements under the United Nations Convention against Corruption (UNCAC) would serve the efforts of Member States to detect corrupt practices, as well as speed up the process of asset recovery through facilitating cooperation amongst Member States for the recovery of stolen public funds from abroad."[52]

60. Netherlands also stated, "[i]t can be a challenge, or at least it is more complex, to enforce a non-trial resolution if the assets are abroad, since in the current situation it concerns non-court decisions in the Netherlands, therefore enforcement cannot be done via regular MLA in most circumstances. Thus, in cross-border situations the cooperation of the defendant is necessary. In practice that is a possibility for the settlements and transactions, because in the Dutch system those are only applied in a situation where there is a cooperating defendant. Cross-border enforcement of a penal order of the public prosecutor is up-to-date not possible. Therefore, the use of penal orders in corruption cases with foreign defendants/assets is not expedient." Netherlands also recommended as a possible solution, "[a]n international agreement for mutual legal assistance between judicial authorities of different states to enforce non-trial and non-court decisions would make it easier/more efficient to finalize the

[48] UK Serious Fraud Office, "AI powered 'Robo-lawyer' helps step up the SFO's fight against economic crime," 10 April 2018.

[49] UK SFO – Rolls Royce Deferred Prosecution Agreement. The company also entered into a Deferred Prosecution Agreement with the US Department of Justice (US DOJ Press Release, "Rolls-Royce plc Agrees to Pay $170 Million Criminal Penalty to Resolve FCPA Case," 17 July 2017) and a Leniency Agreement with Brazilian authorities (Brasil Ministerio Publico Federal (MPF), Termo de Acordo de Leniencia Rolls-Royce Group (13 January 2017).

[50] More information on the Asset Forfeiture Fund at justice.gov/afp/fund#po3; the Fund's annual reports also provide summary information on asset sharing with foreign governments.

[51] For example, Fiscalia General del Estado (Ecuador), Boletin de Presensa FGE No. 215-DC-2017, "Fiscal General del Estado cumplio agenda en Panama para fortalecer la cooperacion internacional intercambiar informacion sobre el caso Odebrecht," 30 October 2017, which noted the participation by the authorities of Panama, Switzerland, Argentina, Portugal, Mexico, Colombia, Ecuador, El Salvador, Portugal, Guatemala and Peru.

[52] Saudi Arabia Response to UNODC Questionnaire (2021).

confiscation of assets (like immovable property) abroad in case of a settlement, transaction or penal order."

Principles on compensation of victims

61. One result from the London Anti-Corruption Summit in 2016 was the UK General Principles to compensate overseas victims (including affected States) in bribery, corruption and economic crimes cases. The Guidance to the General Principles states: "Where the victim is an overseas person(s) 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. This will be an entirely voluntary section on the part of the UK Government and the relevant departments."[53]

VIII. Conclusions

62. 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.

63. 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 multijurisdictional settlements and recognition of their legitimate ownership of proceeds of corruption offences.

64. As observed previously, while there are recent examples demonstrating the commitment of individual jurisdictions to involve affected countries and other victims in settlements, overall, these examples do not suggest that 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.

65. 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.

66. States parties may also want 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.

67. States parties may want to consider exploring new technologies to help settlement processes become more efficient.

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

69. In recent years, a growing number of affected countries have undertaken enforcement efforts and achieved asset recovery. States may want to consider further expanding informal and formal channels of communication and cooperation are needed in order that more jurisdictions can undertake their own enforcement actions and participate effectively in multijurisdictional enforcements.

70. States parties may also want to consider ways to enhance the implementation of article 53(c) of the Convention on domestic legal mechanisms and procedures allowing to recognize other States parties claims as legitimate owners of corruption proceeds in confiscation proceedings, particularly in the context of employing

[53] The General Principles and the Guidance are available at sfo.gov.uk.

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